Supreme Court, U.S.
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No. 06-___

In the Supreme Court of the United States

TODD RONGSTAD, AND THE VALKYRIE GROUP, LLC
Petitioners

v.

JULIE M. LASSA,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party resisting the compelled identification of association members who wish to remain anonymous must demonstrate specific harm to First Amendment interests before the party seeking identification must assume the burden of demonstrating a compelling governmental interest.

2. Whether the First Amendment permits a court to require individuals who criticize a public official anonymously to disclose their identities so that the official may add them as defendants to a defamation lawsuit, without first requiring the official to show that her defamation claim is at least potentially viable.

3. Whether a party who objects to a court procedure on First Amendment grounds waives that objection merely by failing to argue that the First Amendment requires some particular, alternative procedure.

PARTIES TO THE PROCEEDINGS

The Petitioners in these proceedings are Todd Rongstad and the Valkyrie Group, LLC (collectively, "Rongstad"). Todd Rongstad was a Defendant and Third-Party Plaintiff in the state court. The Respondent in these proceedings and the Plaintiff-Respondent in the state court is Julie M. Lassa. The Valkyrie Group, LLC was a Defendant and Third-Party Plaintiff in the state court. Does 1-5 were named as Defendants in the state court, and Alex Paul was a Third-Party defendant in the state court. American Family Insurance Company was an Intervenor-Defendant in the state court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners state as follows:

The Valkyrie Group, LLC has no parent corporations. No publicly-traded company owns 10% or more of the Valkyrie Group, LLC's stock.

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INTRODUCTION

This case arises out of a defamation suit brought by a state representative who was criticized anonymously during an election campaign. It presents the basic issue of whether a public official may, consistent with the First Amendment, use the civil discovery process to unmask her anonymous critics without first showing that her defamation claim is viable or that there is a compelling governmental interest justifying such discovery. Acting contrary to this Court's decisions—and in direct conflict with decisions of the California Supreme Court, the Second Circuit, the Delaware Supreme Court, and several other state and federal courts—the Wisconsin Supreme Court held that no such showing need be made. This Court's review is necessary to ensure adequate protection for the rights to speak and to associate for political purposes, both core protections guaranteed by the First and Fourteenth Amendments.

The specific issue presented here is of particular importance and urgency today. Over the past several years, there has been an explosion of anonymous political and commercial speech on Internet blogs and chat rooms—and a corresponding surge in "John Doe" defamation lawsuits brought by public officials and corporations against anonymous online speakers. The mere possibility of having to defend against such costly lawsuits substantially chills anonymous speech. Accordingly, if the rules applied by the Wisconsin Supreme Court become the norm, powerful public officials and corporations will be able to use the threat of a defamation action to punish anonymous speakers or deter them from speaking, regardless of the merits of the underlying defamation claim.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin (Pet. App. 1a-76a) is reported at 718 N.W.2d 673.

JURISDICTION

The judgment on appeal was entered on July 13, 2006. Pet. App. 1a-39a. Petitioner's motion for reconsideration was denied on October 3, 2006. Pet. App. 105a-106a. On December 27, 2006, Justice Stevens extended the deadline to file this petition to February 1, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble[.]" U.S. Const., Amend. 1. The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const., Amend. 14, § 1.

STATEMENT OF THE CASE

A proper understanding of the issues presented and why they merit this Court's review requires some familiarity with: (a) The Alliance For a Working Wisconsin; (b) the allegedly defamatory mailer at issue; (c) the proceedings before the trial and appellate courts; and (d) the decision of the Supreme Court of Wisconsin.

A. The Alliance For A Working Wisconsin. When this lawsuit was commenced, the Alliance For a Working Wisconsin ("Alliance") was a 501(c)(4) tax-exempt organization dedicated to educating the public about policy issues related to business, taxes, and families in Wisconsin. Wisc. R. 74, Exh. A at 2.[1] Petitioner Todd Rongstad was the president and a board member of the Alliance. One of the Alliance's purposes was to utilize First Amendment rights to speak out on issues and attempt to influence the public debate.

The Alliance solicited contributions from individuals and organizations to fund public communications on issues

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[1] Citations to "Wisc. R. __" are to the record below.

of importance to its members. The Alliance guaranteed that it would keep its members' identities confidential. Wisc. R. 16 at 2; see also Pet. App. 27a. Alliance members informed Rongstad that if he was compelled to disclose their names, they would no longer participate in the organization for fear of public reprisal and potential legal action. *Ibid.*

B. The Allegedly Defamatory Mailer. One of the Alliance's efforts concerned Respondent Julie M. Lassa, who in 2002 was a Wisconsin State Representative running for re-election. Shortly before the general election, the Alliance published a mailer highlighting connections between Lassa and State Senator Charles Chvala, who had recently been indicted on felony charges. Pet. App. 107a-109a. Rongstad caused the mailer to be sent to voters in Lassa's legislative district, as well as some voters in surrounding areas.

The mailer had no effect on Lassa's re-election to the Assembly. She was re-elected with 73 percent of the vote, a higher percentage than she had received in the previous election two years earlier. Pet. App. 49a. Less than six months later, Lassa was elected to the State Senate in a special election, with more than 61 percent of the vote. *Id.* at 57a.

C. Proceedings Below. More than two months after she was re-elected to the General Assembly, Lassa filed a lawsuit alleging that Rongstad and unnamed others had defamed her through publication of the mailer created by the Alliance. That same day, Lassa's attorney subpoenaed Rongstad to appear for a deposition two weeks later.

1. One week after Rongstad was served with the complaint, he moved to quash the deposition subpoena. Rongstad's counsel filed an affidavit with the motion stating under oath that he intended to file a motion to dismiss on behalf of his client, and he specifically requested "an adjournment of any depositions until after the Court has an opportunity to hear said motion." Pet. App. 111a.

During a hearing on the motion to quash, Rongstad's counsel again informed the court that Rongstad intended to file a motion to dismiss "within a week to 10 days." Pet. App. 113a. Citing *New York Times* v. *Sullivan* and the constitutional privilege afforded to defendants in defamation actions brought by public officials, Rongstad's counsel urged the court to quash the deposition. *Ibid.* The circuit court rejected Rongstad's request, stating that "[t]here is no basis under the law to say that simply because someone . . . represents that they intend to file a motion to dismiss . . . that they are therefore . . . . not subject to having their deposition taken," and that it was "not persuaded that there [was] any reason to delay . . . until a motion to dismiss was filed and briefed and decided." *Id.* at 115a-117a. By order of the circuit court, then, Rongstad was deposed less than two weeks after being served with the complaint.

During the deposition, Lassa's counsel asked Rongstad to disclose the names of members of the Alliance who were involved in the funding, preparation and distribution of the mailer. Rongstad objected to these questions, arguing that the information sought by Lassa was privileged from disclosure under the First Amendment. Pet. App. 6a.

Lassa's counsel then called the trial court and asked for a ruling on the objection. After denying Rongstad's counsel's request to brief the constitutional issues, the court asked Rongstad's counsel what cases supported his constitutional objection. Wisc. R. 144 at 10, 17, 20. Rongstad drew the court's attention to several relevant decisions of this Court, including *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995), and *NAACP* v. *Alabama*, 357 U.S. 449, 460-65 (1958). Wisc. R. 144 at 14-15, 19.

During a hearing on Rongstad's objections the following day, Rongstad's counsel squarely presented his constitutional arguments and noted that Lassa's attempt to identify anonymous Alliance members and add them as defendants to her lawsuit would obviously chill the exercise of their

First Amendment rights. Wisc. R. 145 at 8, 20-21. The trial court overruled the objection, ordering Rongstad to "answer all questions pertaining to the identity of the persons involved in the preparation, funding or distribution of the [mailer] and pertaining to their conduct in this regard." Pet. App. 87a, 85a. The court denied Rongstad's request for a stay pending interlocutory appeal.[2]

When Rongstad's deposition resumed, he again refused to disclose the identities of any contributors to the Alliance on First Amendment grounds. Wisc. R. 42. However, he testified that he was the only person "involved" in the "preparation" and "distribution" of the mailer, and that no specific Alliance members directly funded the mailer because the Alliance's contributions were not earmarked for specific projects. *Ibid.* Accordingly, Rongstad believed he had complied with the court's order without disclosing any additional members of the Alliance.

2. Rongstad also filed a motion for reconsideration. In support, Rongstad submitted an affidavit stating that he had recently discussed Lassa's lawsuit with Alliance members who told him that they "would no longer be interested in participating in the organization . . . for fear of public repri-

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[2] Rongstad's counsel filed an immediate petition for leave to appeal the circuit court's discovery orders, and a request for a stay. During a telephonic hearing on Rongstad's motion for stay, Rongstad's counsel argued that the circuit court had erred by concluding that "all of the Alliance's constitutional rights [were] overridden simply by *allegations* of defamation." Pet. App. 120a (emphasis added). He also repeated his argument that the trial court was constitutionally required to rule on his motion to dismiss before ordering the disclosure of the Alliance members' identities. *Id.* at 122a-125a.

Nevertheless, the appellate court denied Rongstad's motion to stay the circuit court's orders. Rongstad's petition to appeal the orders compelling disclosure was denied almost two months later. Wisc. R. 55, 56.

sal and potential legal action." Wisc. R. 16 at 2; see also Pet. App. 27a. Moreover, during a hearing on the motion, Rongstad's counsel argued that the identities of Alliance members were not relevant because Rongstad had testified that he was solely responsible for the mailer. Wisc. R. 146 at 4-5.

The trial court denied the motion. Again, rather than requiring *Lassa* to make any showing of need or to demonstrate that her suit was anything more than an effort to squelch speech, the court ruled that *Rongstad's* affidavit failed to make a sufficient "factual showing" of potential harm to First Amendment rights that the court concluded he was required to make under *Buckley v. Valeo*, 424 U.S. 1 (1976), Pet. App. 93a. Although the court acknowledged that the Alliance members probably had "legitimate fear" that they would be added as defendants to Lassa's lawsuit, the court found this insufficient to trigger First Amendment protections for the Alliance members' anonymity. *Id.* at 94a.

Five days later (and approximately two weeks after being served with the Complaint), Rongstad filed a motion to dismiss. Wisc. R. 24, 25. The court refused to schedule the motion for a prompt hearing, and did not rule on this motion until some four months later. Wisc. R. 27, 151.

3. Ten days after Rongstad filed his motion to dismiss, Lassa filed a motion for contempt and sanctions, which the court, by contrast, agreed to hear one week later. Wisc. R. 36, 37. In response to Rongstad's argument that the court's previous order did not require him to disclose any additional Alliance members, the trial court issued a second order purporting to "clarify" and "narrow" the initial order. Specifically, the court ordered Rongstad to "to provide the records and disclose the names of any person who contributed . . . $100 or more in the aggregate" during the eleven months preceding November 1, 2002. Pet. App. 98a.

When his deposition resumed, Rongstad once again asserted a constitutional privilege. The court later held Rongstad in contempt for refusing to disclose the names, and

imposed contempt sanctions against Rongstad (including more than $32,000 in attorney's fees and a daily $1,000 forfeiture until the disclosure was made). Pet. App. 100a-102a. The court denied Rongstad's request to stay its contempt order pending appeal. *Ibid.*[3] It ultimately entered default judgment against Rongstad for failing to provide sufficient details about the contributors to the Alliance. Pet. App. 104a.

Shortly thereafter, the parties reached a conditional settlement. The parties filed a stipulation and order for entry of a combined judgment on the contempt sanctions and dismissal of the defamation claim with prejudice. Wisc. R. 141. The stipulation and order specified that Rongstad preserved the right "to appeal the appropriateness of the fees and forfeitures under the First Amendment . . . and whether the Courts were justified in the award, and any other applicable legal theories." *Id.* at 2.

D. The Wisconsin Supreme Court's Decision. Rongstad appealed the trial court's contempt and sanctions orders to the Wisconsin Court of Appeals, which certified the appeal to the Wisconsin Supreme Court.

On July 13, 2006, a majority of the Wisconsin Supreme Court affirmed the circuit court's imposition of sanctions. The majority acknowledged that "the decision to remain anonymous is an aspect of the freedom of speech" and association that is "protected by the First Amendment." Pet. App. 16a. Accordingly, the majority recognized that "[c]ertainly, a defamation plaintiff should not be able to employ the rules of discovery to obtain the identity of an anony-

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[3] Rongstad promptly filed with the Supreme Court of Wisconsin a petition for leave to appeal the court's contempt and sanctions order and a petition for supervisory writ, along with a motion for stay pending appeal. Both petitions were denied. Pet. App. 55, 56.

mous political speaker simply by filing a complaint that is facially unsustainable." Pet. App. 17a.

The court nevertheless rejected Rongstad's claims of constitutional privilege. Rather than require the *party seeking disclosure* to make any kind of preliminary showing, the court required *Rongstad* to make a "preliminary factual showing" demonstrating a "reasonable probability of an actual chilling effect on First Amendment rights." *Id.* at 24a; see also *id.* at 27a-30a. [4] The court interpreted *NAACP* and *Buckley* as requiring this "preliminary factual showing" to include "objective, particularized facts" and "evidence of particular instances of past or present threats, harassment, or reprisals." *Id.* at 27a-28a. Relying largely on decisions of the Ninth Circuit, the court also ruled that "[a] subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement," and stressed the need for "objective and articulable facts." *Id.* at 26a (citing *Dole v. Local Union 375*, 921 F.2d 969, 973 (9th Cir. 1990), and *Brock v. Local 375*, 860 F.2d 346, 350 n.1 (9th Cir. 1988)). After finding that Rongstad failed to make a sufficiently specific and detailed "preliminary factual showing," the court concluded that it "need not reach the question of whether there

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[4] The court's holding on this issue is contained in a lead opinion authored by Chief Justice Abrahamson and Justice Bradley. Pet. App. 24a-31a. Three of the four Justices who decided the case held that the court had jurisdiction to address the lower court's rulings rejecting Rongstad's claims of constitutional privilege as to the discovery and sanctions orders. Justice Butler disagreed on mootness grounds. *Id.* at 39a-46a. Although Justice Butler joined a portion of the court's opinion on the merits, he expressly declined to reach the constitutional privilege issues. *Id.* at 39a-40a. Thus, his opinion does not support the court's judgment affirming the decision below on the constitutional issues. Justice Prosser found jurisdiction, but dissented as to the court's analysis of the constitutional issues. *Id.* at 46a-76a. Thus, the lead opinion represents the court's holding on the constitutional issues.

are compelling interests here that would outweigh a constitutional privilege." Pet. App. 29a.

The court also rejected Rongstad's procedural argument that the First Amendment required the trial court to rule on his motion to dismiss before ordering the discovery at issue and imposing sanctions. *Id.* at 15a-24a. In so holding, the majority attempted to reconcile its analysis with the Delaware Supreme Court's recent decision in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). Pet. App. 18a-21a. The *Cahill* court held as a constitutional matter that a public official defamation plaintiff may not obtain the identity of an anonymous defendant through discovery unless he first produces evidence sufficient to make a prima facie showing as to each of the elements of his defamation claim within his control. See *Cahill*, 884 A.2d at 457, 463. The *Cahill* court applied this rule because it was concerned that a recent surge in "John Doe" defamation lawsuits—many of which are brought merely to silence anonymous critics—threatens to chill anonymous speech. Purportedly responding to these concerns, the majority here agreed that a circuit court should "ordinarily" "decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to disclose" anonymous association members. Pet. App. 21a. However, the majority refused to apply this procedure to Rongstad's case because it found that Rongstad had not sufficiently raised the issue before the circuit court—even though it conceded that he had asserted a constitutional privilege throughout the proceedings. *Id.* at 21a-23a. Thus, unlike *Cahill*, the majority did not rule that a public official defamation plaintiff is constitutionally required to make some showing that her defamation claim is viable before she may unmask her anonymous critics.

Justice Prosser dissented, noting that "this case is at the epicenter of First Amendment principles, inasmuch as it involves not only the heavily protected freedom to criticize government officials . . . but also the right to facilitate political speech through the expenditure of money, . . the right to

anonymous speech, . . . the right to associate with others for expression purposes and the right to privacy in those associations." *Id.* at 57a. Accordingly, the dissent concluded that the circuit court should have applied "exacting scrutiny" to Lassa's discovery request and thus "ensured that its discovery order was 'narrowly tailored to serve an overriding state interest.'" *Id.* at 57a-58a. The dissent found that the majority had erred by "fail[ing] to examine with exacting scrutiny the legitimacy of the asserted state interests[,]" and by "dismiss[ing] as unsubstantiated Rongstad's assertion that disclosure would chill First Amendment rights." *Id.* at 67a.

The dissent further found that Lassa could not demonstrate a "compelling [governmental] interest" in the disclosure. *Id.* at 59a-63a. He stressed the high burden that public officials must meet to prove defamation, and noted that the State's interest in protecting officials from defamation is outweighed by the need for open political discourse about candidates' character and qualifications for office. *Id.* at 59a-61a. Accordingly, the dissent concluded that there was "no discernible reason why the court should have forced Rongstad to answer *every* question related to the [mailer] before determining that Lassa's suit could survive a motion to dismiss." *Id.* at 61a (emphasis in original).[5]

The dissent also found it significant that, unlike *NAACP*, *Buckley*, and any of the other cases cited by the majority, "this case concerns a public official's attempt to obtain confidential membership information in the course of a defamation claim *for the purpose of adding those anonymous members as defendants in the lawsuit.*" *Id.* at 63a (emphasis in original). The dissent noted that "[t]his distinction matters because the

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[5] The dissent also disputed the majority's conclusion that Rongstad had failed to argue that the trial court was required to rule on his motion to dismiss before imposing sanctions, noting that Rongstad "requested repeatedly that the circuit court act first on the motion to dismiss." *Id.* at 52a-53a, 70a.

amount of time and money required for private individuals to defend against a defamation claim should be recognized as sufficient to establish an objective, substantial chill upon First Amendment rights." *Ibid.*

REASONS FOR GRANTING THE WRIT

Certiorari is warranted for three reasons. *First,* the Wisconsin Supreme Court's holding that Rongstad must make a substantial "preliminary factual showing" of specific harm to the First Amendment rights of anonymous speakers exacerbates an existing conflict between the Ninth Circuit (on whose decisions the court below relied) on the one hand, and the California Supreme Court, the Court of Appeals of New York, and the Second Circuit, on the other hand. Like this Court, each of these latter courts has held that anonymous political speakers may be forcibly unmasked only where the disclosure is narrowly tailored to a compelling state interest, without requiring any specific showing of additional harm to First Amendment rights.

Second, the Wisconsin Supreme Court's decision squarely conflicts with a recent decision of the Delaware Supreme Court and with several other recent decisions, each of which held that the First Amendment requires a public official defamation plaintiff to make a preliminary showing that his defamation claim is plausible before he may obtain the identities of anonymous speakers through discovery. Unlike the Wisconsin Supreme Court, these decisions recognize that the prospect of being added as a defendant to a defamation lawsuit itself threatens to chill anonymous speech, and they correctly require public figure plaintiffs to demonstrate a compelling need for the discovery before impinging on the constitutional rights of anonymous speakers.

Third, the majority's conclusion that Rongstad waived the latter issue—by failing to argue specifically that the First Amendment required the trial court to rule on his motion to dismiss before ordering the disclosure—contravenes this Court's presumption against waiver of First Amendment

rights and improperly imposes a substantial burden on litigants seeking to raise and preserve constitutional objections.

I. THE WISCONSIN SUPREME COURT'S "PRELIMINARY SHOWING" REQUIREMENT FOR ANONYMOUS SPEAKERS WARRANTS THIS COURT'S REVIEW.

As noted, the Supreme Court of Wisconsin required Rongstad to make a substantial "preliminary factual showing" demonstrating a "reasonable probability of an actual chilling effect on First Amendment rights"—beyond the self-evident chilling effect of an order requiring the unmasking of anonymous donors—before it would consider whether Lassa's discovery request was justified by a compelling state interest. Pet. App. 24a; *see also id.* at 25a-29a. The Court required this showing to include "objective, particularized facts" and "evidence of particular instances of past or present threats, harassment, or reprisals." *Id.* at 27a-28a. The court found that Rongstad had failed to make this heightened showing even though Rongstad noted that Lassa sought the Alliance members' identities to add them as defendants to a highly publicized lawsuit, and had produced an affidavit describing the chilling effect of the litigation on the Alliance membership. *Ibid.* Because it found Rongstad's "preliminary factual showing" insufficient, the court concluded that it "need not reach the question" of whether Lassa had shown a "compelling interest" in discovering the Alliance members' identities. *Id.* at 29a.

As shown below, the court's decision on this issue exacerbates a pre-existing conflict among several state and federal courts. It also conflicts in principle with this Court's decisions in this area.

A. As The Court Below Recognized, Its Decision Exacerbates A Pre-Existing Conflict Between the Ninth Circuit And Several Other State And Federal Courts, Including The California Supreme Court, the Second Circuit and the Court of Appeals of New York.

In imposing its "preliminary showing" requirement, the Wisconsin Supreme Court relied on several authorities, including the Ninth Circuit's decisions in *Dole* and *Brock*. See Pet. App. 26a-27a. These two related cases involved a Department of Labor ("DOL") investigation into the activities of a union's political and charitable fund. During its investigation, the Department subpoenaed financial records that would reveal the names of the Fund's contributors. The Fund refused to comply with the subpoenas on First Amendment grounds. But the Ninth Circuit required the Fund to make a "*prima facie*" showing of "objective and articulable facts" to support its claim of a First Amendment privilege. *Brock*, 860 F.2d at 350.

On remand, the Fund attempted to make this preliminary showing by presenting, among other things, an affidavit by the Fund's administrator and an auditor's report "documenting a rather precipitous decline in the Fund's contributions." *Dole*, 921 F.2d at 971. The Ninth Circuit found this factual showing insufficient because it "established no causal nexus between the . . . subpoenas and a decline in contributions," and because the Fund failed to "tender evidence supporting a well-founded fear" that disclosure of its contributor list would "discourage membership or substantially frustrate the organization's operations." *Id.* at 974. Because it found the Fund's "*prima facie* showing" insufficient, the Ninth Circuit, much like the Wisconsin Supreme Court in this case, held that it "need not decide if the subpoenas rationally promote a compelling governmental interest." *Ibid.*

Other courts, including the First, Third and Tenth Circuits as well as the Texas Supreme Court, have likewise re-

quired parties resisting the compelled disclosure of their anonymous associational activities or affiliations to produce evidence of specific potential harm to their First Amendment interests before requiring the state actor seeking disclosure to demonstrate a compelling interest. See, *e.g.*, *Salvation Army* v. *Department of Community Affairs*, 919 F.2d 183, 201 (3d Cir. 1990); *United States* v. *Comley*, 890 F.2d 539, 543-45 (1st Cir. 1989); *In re First Nat'l Bank, Englewood, CO.*, 701 F.2d 115, 118 (10th Cir. 1983); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998); *Snedigar* v. *Hodderson*, 786 P.2d 781, 785-86 (Wash. 1990).

However, the Supreme Court of California and several other state and federal courts have rejected this approach. These courts have ruled that, where the circumstances suggest that the disclosure of anonymous speech or association is likely to chill First Amendment activity as a practical matter, the party seeking disclosure must demonstrate that the request is substantially related and narrowly tailored to a compelling state interest. These courts each require the party to shoulder this burden without first requiring the anonymous speaker to make a preliminary evidentiary showing supporting his claim of constitutional privilege.

In *Britt* v. *Superior Court of San Diego County*, 574 P.2d 766, 774-74 (Cal. 1978) (en banc), for example, the Supreme Court of California vacated a discovery order requiring plaintiffs to disclose their private associational affiliations and activities. Although it recognized that "the right of associational privacy is not absolute," the court interpreted this Court's decisions as establishing that "private association affiliations and activities . . . are *presumptively immune* from inquisition," and thus that "the government bears the burden of demonstrating the justification for compelling disclosure." *Id.* at 773 (emphasis added, citations and internal quotation omitted). Thus, before obtaining information about a party's associational activities through discovery, the *party seeking disclosure* must establish that disclosure "serve[s] a 'compelling' state purpose" and that the state's

purpose cannot be achieved through less intrusive means. *Ibid.*

The *Britt* court did not require the plaintiffs to make a preliminary evidentiary showing of specific harm to their constitutional rights before holding the state to its burden. To the contrary, the court noted that this Court's decisions "recognize that compelled disclosure of private associational affiliations or activities will *inevitably deter* many individuals from exercising their constitutional right of association," and therefore "establish[] that intrusion into associational privacy may be sanctioned *only upon the demonstration of a . . . 'compelling' state interest which necessitates the disclosure.*" *Id.* at 768 (emphasis added).

The Second Circuit has applied the same standards. In *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-04 (2d Cir. 1985), a member of the Hell's Angel's Motorcycle Club refused to answer questions about the Club before a grand jury, asserting his First Amendment right to freedom of association. 776 F.2d at 1102-03. The Second Circuit applied "exacting scrutiny" and required the government to show both a "compelling interest" and a "substantial relation" between that interest and the information sought. *Id.* at 1102 (citing *Buckley*, 424 U.S. 1, 64 (1976), *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963), and *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960)). The court also ruled that the means used to achieve the state's purposes must not be "unduly broad." *Ibid.* (citation omitted). Although a showing of "particularized harm such as harassment or reprisals" might "justify the curtailment of an otherwise justifiable investigation," the party resisting disclosure was *not* required to make such a particularized showing before the court required the state to show a compelling interest in disclosure.

Similarly, in *Local 1814, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n of New York Harbor*, 667 F.2d 267, 270-72 (2d Cir. 1981), the Second Circuit ruled that because

"[d]isclosure of the identities of a group's members or contributors may have the practical effect of discouraging the exercise of [First Amendment] rights," "governmental attempts to compel such disclosures have been subjected to exacting scrutiny" and are "not permitted unless [they] are substantially related to a compelling governmental interest." 667 F.2d at 270-71 (citing *NAACP*, 357 U.S. at 462, *Buckley*, 424 U.S. at 64-74, and other authorities). Accordingly, the court required the government to show a compelling state interest to justify such disclosures, even though the plaintiffs had made no particularized showing that disclosure of contributors' identities would lead to "economic or physical harassment or other manifestation of public hostility against" association members. 667 F.2d at 271.[6] The New York Court of Appeals has employed a similar analysis. See *In re Grand Jury Subpoenas for Locals 17, 135, & 608*, 528 N.E.2d 1195, 1198-1200 (N.Y. 1988) (ruling that "[w]hen a First Amendment claim is presented, the government may not enforce a subpoena" seeking the names and contact information of association members "unless it is substantially related to a compelling governmental interest," and requiring no preliminary showing from association members before applying this standard).

By requiring Rongstad to make a preliminary evidentiary showing of specific harm to his First Amendment rights before considering whether Lassa could demonstrate a compelling interest in the disclosure, the Wisconsin Supreme Court has exacerbated a pervasive conflict among

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[6] Accord *Federal Election Comm'n* v. *LaRouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987) (holding that subpoena seeking identities of campaign solicitors and contributors "tread[ed] in an area rife with first amendment associational concerns," and requiring the government to make a heightened showing of need for the information even though the campaign "had not made a showing that disclosure of those associates with it was likely to result in reprisals, harassment, or threats").

several state and federal courts. Indeed, the court explicitly acknowledged that its decision was in conflict with *Britt* and other decisions. Pet. App. 29a.

In short, because the lower courts widely disagree about the standards and burdens to apply in analyzing First Amendment claims like Rongstad's, the scope of an anonymous speaker's First Amendment rights currently depends largely upon geography. Indeed, in California, an anonymous speaker's ability to resist the disclosure of his identity through a court-ordered subpoena or discovery request will turn largely on whether the claim is brought in state or federal court. The application of fundamental constitutional rights should not depend on such arbitrary considerations. This Court should grant certiorari to clarify the applicable constitutional standards.

B. Like The Ninth Circuit Decisions On Which It Relied, The Decision Contravenes This Court's Decisions.

The Wisconsin Supreme Court's decision is also contrary to several decisions of this Court defining the scope of First Amendment protections for anonymous political speech and association. This Court has repeatedly held that a speaker's decision to remain anonymous "is an aspect of the freedoms of speech" and association protected by the First Amendment. *McIntyre*, 514 U.S. at 342; *NAACP* v. *State of Alabama*, 357 U.S. 449, 460-65 (1958). Moreover, the Court has noted that anonymous speech enjoys heightened constitutional protection when it addresses political issues. See *McIntyre*, 514 U.S. at 346 (anonymous speech involving "[d]iscussion of public issues and debate on the qualifications of candidates" "occupies the core of the protection afforded by the First Amendment"). Indeed, "[n]o form of speech is entitled to greater constitutional protection." *Id.* at 347. Accordingly, when a law burdens anonymous political speech or association, reviewing courts must apply "exacting scrutiny" and may uphold the restriction only if it is "narrowly tailored" to serve a compelling state interest.

Ibid. See also *NAACP*, 357 U.S. at 460-63; *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982).

1. This Court's decisions necessarily imply that, once it is clear that a discovery request's purpose is to unmask anonymous political speakers, it is the proponent of the request, not the anonymous speakers, who must make a preliminary showing—in this case of a genuine need for the information. As this case amply illustrates, if anonymous speakers are required to make a "preliminary showing" of harm to their First Amendment rights before the court will even consider the plaintiff's need for the information, the First Amendment harm recognized in decisions such as *McIntyre* and *NAACP*—the unmasking of anonymous speakers—will have occurred before the compelling interest analysis is ever undertaken. And the First Amendment right to anonymous speech will be seriously compromised.

Like the Ninth Circuit and a number of other courts, the Wisconsin Supreme Court ignored these principles and attempted to justify its "preliminary showing" requirement by misreading this Court's decisions. For example, the court asserted that *Buckley* requires a party resisting disclosure of its political contributions to demonstrate a "reasonable probability that the compelled disclosure . . .will subject [it] to threats, harassment, or reprisals from either government officials or private parties[.]" Pet. App. 25a-26a. But *Buckley* merely holds that "the substantial public interest in disclosure" demonstrated by the state in that case "outweigh[ed] the harm to speech and associational interests generally alleged" by the plaintiffs. 424 U.S. at 72. *Buckley* did *not* hold or imply that an anonymous speaker must make an evidentiary showing of potential harm—beyond the loss of anonymity—*before the court will consider the state's purported interest in the disclosure.* To the contrary, this Court balanced the government's interest against the asserted harm to plaintiff's rights in *Buckley* even though serious infringement of First Amendment rights was "highly speculative" and no appellant had tendered evidence of the sort proffered in

NAACP. See *id.*, 424 U.S. at 68-72. Moreover, like this Court's other relevant precedents, *Buckley* confirmed that the government may not compel the disclosure of anonymous political speech unless it can show that the disclosure is "substantially related" to a pressing government interest. *Id.* at 64.[7]

In sum, this Court has *never* held that a party resisting disclosure of his anonymous political speech or affiliations must necessarily make a threshold evidentiary showing of probable harm to his First Amendment rights before the court will consider whether the opposing party has an interest in the disclosure. Indeed, in cases involving the disclosure of anonymous political speech or association, this Court has frequently *presumed* harm to an anonymous speaker's First Amendment rights.[8] Such a presumption is

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[7] See also *AFL-CIO* v. *Federal Election Comm'n*, 333 F.3d 168, 176 (D.C. Cir. 2003) (noting that this Court required an evidentiary showing of probable threats, harassment or reprisals in *Buckley* "only after concluding that the disclosure requirements at issue survived strict scrutiny as the least intrusive means of achieving several compelling government interests"); *Snedigar* v. *Hodderson*, 786 P.2d 781, 785 (Wash. 1990) (en banc) (noting that "[t]he *Buckley* Court did not refuse at the outset . . . to weigh a speculative claim of harm against the need for the information . . . . Rather, it held that a speculative claim would be defeated by a strong need for the requested information and that a stronger claim might . . . defeat the interest in disclosure").

[8] See, *e.g.*, *Talley* v. *California*, 362 U.S. 60, 64 (1960) (holding ordinance requiring names and addresses on all distributed handbills unconstitutional because of its obvious tendency to restrict freedom of expression without requiring a showing that speech was deterred); *Shelton* v. *Tucker*, 364 U.S. 479, 485 (1960) (chilling effect presumed if teachers who served at the will of school board were required to disclose all organizations to which they belonged); *Pollard* v. *Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968) ("it would be naive not to recognize" that disclosure of Republican campaign fund contributors would subject some to reprisals, inhibit membership and contributions, and vio-

particularly appropriate where, as here, a public official seeks to unmask anonymous critics in order to name them as defendants to a defamation lawsuit. Standing alone, the prospect of having to defend against a costly and potentially embarrassing lawsuit is likely to discourage an anonymous speaker from exercising his First Amendment rights.

In addition, requiring the *defendant* to make a preliminary showing in such cases disregards the constitutional limitations that apply to defamation claims brought by public officials. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Moreover, public officials "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood[s]," and they "have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

For all these reasons, this Court has ruled that public officials must make a heightened showing to prove defamation: They must prove that the allegedly defamatory statement was false and made with actual malice. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986); *Sullivan*, 376 U.S. at 274.

2. The Wisconsin Supreme Court's failure to apply these principles warrants certiorari. The court should have applied "exacting scrutiny" to the circuit court's orders because they implicated the Alliance members' rights to speak and associate anonymously for political purposes. Had the court done so, it could and should have presumed that the discovery ordered by the circuit court would have the "practical effect" of chilling the Alliance members' anony-

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late rights of the Party and of the contributors, even where there was no record evidence of reprisals).

mous political speech and association. See *NAACP*, 357 U.S. at 462-65. At a minimum, the court should have balanced the potential harm to the Alliance members' First Amendment rights against the State's or Lassa's purported interest in disclosure. *See Buckley*, 424 U.S., at 68-74; *NAACP*, 357 U.S. at 462-65.[9]

The court did neither. Instead, it erroneously shifted the burden of production to Rongstad, requiring him to make a "preliminary showing" of probable harm to the Alliance members' constitutional rights before it would even consider Lassa's interest in the disclosure. As a result, the court upheld the circuit court's discovery and sanctions orders without requiring Lassa to show *any* need for the discovery at issue, much less a "compelling need" sufficient to justify the abridgement of the Alliance members' First Amendment rights. The court's analysis is contrary to this Court's precedents and should be overturned.[10]

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[9] Throughout his briefs to the Wisconsin courts, Rongstad argued that the First Amendment protects against compelled disclosure of an anonymous speaker absent a compelling state interest, and that courts must determine whether a public official's defamation claim is viable before ordering such disclosure. Rongstad argued in the alternative that, *if* he were required to make a "prima facie" showing of harm to his First Amendment rights, he sufficiently made such a showing. However, Rongstad never conceded that the court could order disclosure or impose sanctions without even considering whether Lassa had any interest in the disclosure.

[10] Had the court examined Lassa's or the state's purported interests in the discovery, it could not have found them "compelling." At the time of the circuit court's order, Rongstad had taken full responsibility for the mailer at issue, had been named as a defendant, and stood ready to pay damages if defamation were proven. Thus, Lassa could have cleared her name by proceeding against Rongstad alone. There was no "compelling" need for Lassa to name additional defendants to her lawsuit within a month of filing the case. And the fact that Lassa's voting percentage went up in the election immediately following the distribution of the

II. THE WISCONSIN SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF DELAWARE AND SEVERAL LOWER COURTS ON WHETHER A PUBLIC OFFICIAL MUST SHOW THAT HER DEFAMATION CLAIM IS VIABLE BEFORE OBTAINING THE IDENTITY OF AN ANONYMOUS SPEAKER.

Certiorari is also warranted because the Wisconsin Supreme Court's decision directly conflicts with decisions of the Supreme Court of Delaware and several other courts, which hold that a public official defamation *plaintiff* must make a preliminary showing that her claim is viable before she may compel the disclosure of anonymous speakers.

1. The Wisconsin Supreme Court's decision is in direct conflict with *Doe* v. *Cahill*, 884 A.2d 451 (Del. 2005). There the Delaware Supreme Court held that a public figure defamation plaintiff may not obtain the identity of an anonymous defendant through compelled discovery unless he first produces evidence sufficient to make a prima facie showing as to each of the elements of his defamation claim within his control. See *Cahill*, 884 A.2d at 457, 463.

The circumstances addressed in *Cahill* are substantively identical to those presented here. The plaintiff was a city councilman who brought a defamation lawsuit against four "John Does" who had posted allegedly defamatory statements about him anonymously on an Internet blog. See *id.* at 454. Cahill sought to compel the defendants' Internet service provider to reveal defendants' identities so that he could proceed against them in the lawsuit. *Ibid.* One of the "Doe" defendants filed a motion for protective order, which the trial court denied. The trial court ruled that Cahill could obtain Doe's identity because he had shown that he "had a legitimate, good faith basis upon which to bring" his claim,

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mailer, while its impact was fresh, belied Lassa's claim that the mailer would harm her potential bid for the state senate.

that the information sought "was directly and materially related" to his claim, and that "the information could not be obtained from any other source." *Id.* at 455.

The Supreme Court of Delaware reversed. The court found that the "good faith" standard applied by the trial court was "too easily satisfied to protect sufficiently a defendant's right to speak anonymously," because plaintiffs can often satisfy that test "even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision." *Id.* at 457. The court noted that "setting the standard too low will chill potential protesters from exercising their First Amendment right to speak anonymously" because "the possibility of losing anonymity in a future lawsuit could intimidate [them] into self-censoring their comments or simply not commenting at all." *Id* at 457 (citation omitted). The court found these concerns particularly pressing given the recent proliferation of "John Doe" defamation lawsuits, because "many defamation plaintiffs bring suit merely to unmask and silence their anonymous critics. *Ibid.* The court feared that this trend "will discourage debate on important issues of public concern[.]" *Ibid.* Accordingly, the *Cahill* court held that to obtain discovery of an anonymous defendant's identity, a public official defamation *plaintiff* must make a preliminary showing of need before a court can order such discovery.

Several other courts have required public figure defamation plaintiffs to show that their claims are viable before ordering disclosure of the identities of "John Doe" defendants. See, *e.g., Dendrite Int'l, Inc. v. Doe No. 3*, 774 A.2d 756, 760 (N.J Super. 2001) (requiring corporate plaintiff to submit sufficient evidence to establish a prima facie case for each essential element of its defamation claim); *Best Western Int'l, Inc. v. Doe*, No. CV-06-1537, 2006 WL 2091695, *5 (D. Ariz. July 25, 2006) (same); *McMann v. Doe*, 460 F. Supp. 2d 259, 270 (D. Mass. 2006) (holding that a defamation plaintiff did not "me[et] the evidentiary burden required to remove John

Doe's constitutional interest in anonymity" where his claims could not survive a motion to dismiss).

Although each of these courts applies a slightly different standard, each of them, unlike the Wisconsin Supreme Court, properly requires the plaintiff to demonstrate a genuine need for the discovery *before* impinging upon the defendant's First Amendment rights to anonymous speech. Unlike the Wisconsin Supreme Court, each of these courts recognizes that, because the prospect of having to defend against a defamation claim will chill anonymous speech, courts should assure themselves that the claims asserted against anonymous speakers have some merit—and are not merely a pretext for obtaining discovery—before permitting plaintiffs to breach the veil of anonymity.[11]

In sum, regardless of the exact threshold requirements imposed by these decisions, all of them, including *Cahill*, squarely conflict with the Wisconsin Supreme Court's decision on the central question of whether the First Amendment requires a public official plaintiff to make some showing that her claim is viable before a court can order

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[11] These decisions are consistent with decisions requiring similar threshold showings before permitting plaintiffs to unmask anonymous speakers in other contexts. See, *e.g.*, *National Labor Relations Bd.* v. *Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998) (upholding denial of NLRB's motion to compel newspaper to identify anonymous poster of classified ad on First Amendment grounds because NLRB had not developed "any factual support for its action"); *Rancho Publications* v. *Superior Court*, 68 Cal.App. 4th 1538, 1541 (Cal. App. 1999) (refusing discovery of identity of anonymous advertisers because plaintiff had failed to demonstrate "compelling need" for the information); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) (libel plaintiff seeking to uncover journalist's source must provide substantial evidence that its claim "is not frivolous, a pretense for using discovery powers in a fishing expedition").

disclosure of the names of anonymous speakers. That conflict likewise merits this Court's review.[12]

2. This conclusion is not undermined by the Wisconsin Supreme Court's statement that "[w]hen faced with an assertion of constitutional privilege against disclosure of information identifying otherwise-anonymous organization members," the circuit court should "ordinarily" "decide a pending motion to dismiss before sanctioning the party for refusing to disclose that information." Pet. App. 21a. For several reasons, this statement does not eliminate the conflict with *Cahill* and the other cases discussed above.

First, as explained above, the Wisconsin Supreme Court required *Rongstad* to make a "preliminary showing" of potential harm to the Alliance members' First Amendment rights before it would even consider Lassa's need for the disclosure. This ruling was essential to the court's holding, and there is no indication in the opinion that the holding would be limited to Rongstad. Thus, the court placed the burden to make an *initial* prima facie showing squarely on John Doe defendants, not on defamation plaintiffs.

Moreover, the majority did not establish a constitutional requirement that must be applied whenever there is an assertion of a First Amendment privilege against the compelled disclosure of anonymous speakers. Rather, it merely suggested that, when confronted with privilege claims in future cases, courts should "ordinarily" rule on a motion to

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[12] A few courts have required lesser showings from plaintiffs seeking to unmask anonymous defendants. See, *e.g.*, *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000); *Doe* v. *2TheMart.com, Inc.*, 140 F.Supp.2d 1088 (W.D. Wash. 2001). At least one state court has required no heightened showing. See, *e.g.*, *Klehr Harrison Harvey Branzburg & Ellers, PPL* v. *JPA Development, Inc., et al.*, No. 0425, 2006 WL 37020 (Pa. Com. Pl. Jan. 4, 2006). This divergence among the lower courts confirms the need for this Court's intervention.

dismiss before ordering disclosure and imposing sanctions. By its plain terms, this suggestion is merely discretionary, not mandatory.

For proof of this, one need look no further than Rongstad's case. The court affirmed the trial court's order—even though it conceded that Rongstad had asserted a First Amendment privilege throughout the proceedings—because, the court claimed, Rongstad did not *specifically* assert that the court was required to rule on his motion to dismiss before the sanctions were imposed. That claim is mistaken as a factual matter. (See Section III, *infra.*) But in any event, the court's decision makes clear that the mere assertion of a constitutional privilege by an anonymous speaker will not require Wisconsin courts in future cases to rule on a motion to dismiss before ordering disclosure or imposing sanctions.

The Delaware Supreme Court would have decided Rongstad's case quite differently. Because Rongstad timely asserted a constitutional privilege, the Delaware court would have required the public-figure *plaintiff* (Lassa) to demonstrate that her defamation claim was viable before ordering the disclosure.[13] It would not have required *Rongstad* to make a showing of potential harm to his constitutional rights before requiring Lassa to state a prima facie case. Instead, it would have *presumed* such potential harm

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[13] The Delaware Court would also have required Lassa to introduce evidence sufficient to withstand a motion for summary judgment as to each element of her defamation claim within her control. See *Cahill*, 884 A.2d at 457, 463. Although we believe this "summary judgment" standard is more stringent than the prospective "motion to dismiss" standard discussed by the majority, we do not ask this Court to resolve which of these standards is the correct standard. We argue only that the First Amendment requires a public official defamation plaintiff to demonstrate at a minimum that her claim could withstand a motion to dismiss before she may unmask anonymous speakers.

from the fact that Lassa was seeking to unmask the Alliance members to add them as defendants to her lawsuit. It therefore would have required her to show that her claim was viable before ordering discovery, and thus would have given Rongstad a fair opportunity to avoid sanctions.[14]

To avoid repetition of the Wisconsin Supreme Court's errors in courts throughout the country, and to resolve the existing conflict, this Court should clarify that it is the *plaintiff* in a public-official defamation case, not the anonymous speakers (or their representative) that must make at least a preliminary showing of legitimacy before a court will intrude upon the right to anonymous speech.

III. THE WISCONSIN COURT'S CONCLUSION THAT RONGSTAD WAIVED HIS FIRST AMENDMENT OBJECTION TO THE TRIAL COURT'S REFUSAL TO STAY DISCOVERY BEFORE RULING ON HIS MOTION TO DISMISS ALSO WARRANTS REVIEW.

Certiorari is also warranted on the separate question of whether a party who objects to a court procedure on First Amendment grounds waives that objection merely by failing to argue that the First Amendment requires some particular, alternative procedure. This Court's decisions make clear that courts may not "presume acquiescence in the loss of fundamental rights." *Fuentes* v. *Shevin*, 407 U.S. 67, 95 n.31 (1972). Indeed, "courts indulge every reasonable presumption against waiver" of such rights. *Ibid.* (citation and internal quotation omitted). A waiver of constitutional rights in any context must, at the very least, be clear." *Id.* at

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[14] The fact that the circuit court ultimately denied Rongstad's motion to dismiss does not change this analysis. The circuit court denied the motion almost *four months* after it sanctioned Rongstad for refusing to comply with its discovery orders. Had Rongstad known early in the case that Lassa's claims could survive a motion to dismiss, he would not have resisted the court's discovery orders and put himself in a position to be sanctioned.

95. And "[w]here the ultimate effect of sustaining a claim of waiver might be an imposition on" First Amendment rights, this Court is "unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967).

Moreover, a timely constitutional objection to a court procedure is not waived merely because the litigant does not make specific arguments in support of the objection. "[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to . . . preserve the claim for review." *Lee* v. *Kemna*, 534 U.S. 362, 378 (2002); See also *New York ex rel. Bryant* v. *Zimmerman et al.*, 278 U.S. 63, 67 (1928) (claims preserved for review where "the record as a whole shows either expressly or by clear intendment" that the claim was "brought to the attention of the state court with fair precision and in due time"). *Ibid.*

The Supreme Court of Wisconsin failed to apply these well-established principles. To be sure, the court did not find that Rongstad had waived his general First Amendment objection to the trial court's discovery and sanctions orders (the subject of the first question presented here). But it nevertheless affirmed the trial court's order because it concluded that Rongstad did not *specifically* argue that the court was required to decide the motion before discovery proceeded. Pet. App. 21a-24a. This conclusion is mistaken.

First, Rongstad repeatedly argued that the court *was* required to stay discovery pending a decision on his motion to dismiss. One week after he was served with the complaint, Rongstad filed a motion to quash the deposition and requested "an adjournment of any depositions until after the court has an opportunity to hear" Rongstad's motion to dismiss. Pet. App. 111a. In support of this request, Rongstad's counsel referenced the constitutional privilege afforded to defendants in defamation actions brought by

public officials, specifically citing *New York Times* v. *Sullivan*. *Id.* at 113a. The circuit court understood and rejected Rongstad's request. *Id.* at 113a, 115a-117a. On appeal, Rongstad's counsel argued that the circuit court had violated the First Amendment by ordering the Alliance members to reveal their identities "in the face of mere defamatory allegations[,]" again noting the constitutional standard applicable in public official defamation actions. *Id.* at 120a, 122a-125a. Thus, the majority's finding of waiver is flatly contradicted by the record.[15]

In addition, even if Rongstad had failed to argue specifically that the circuit court was constitutionally required to rule on his motion to dismiss before imposing sanctions, such a failure would not waive his constitutional objections to the circuit court's refusal to follow that procedure. Rongstad repeatedly objected to the circuit court's discovery procedures on First Amendment grounds. Rongstad's timely objections brought the alleged federal error to the court's attention and enabled it to take appropriate corrective action. Moreover, the record does not reveal *any* evidence that Rongstad intended to waive his First Amendment rights, much less the "clear and compelling" evidence required to establish such a waiver. See *Curtis*, 388 U.S. at 145. Indeed, the record compels the opposite inference.

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[15] The majority criticized Rongstad for not arguing "that the court was required to decide his motion [to dismiss] before discovery proceeded" at the time that he filed his motion to dismiss or when the court set a briefing schedule on that motion or issued its disclosure and sanctions orders. Pet. App. 21a-22a. However, before any of those events occurred, the circuit court had *already* rejected Rongstad's claim of constitutional privilege and made clear that it would not stay discovery pending a decision on his motion to dismiss. Accordingly, any further objections to the circuit court's orders or the briefing schedule would have been fruitless. The failure to renew such objections does not constitute waiver. *Cf. Osborne v. Ohio*, 495 U.S. 103, 110 (1990); *Kemna*, 534 U.S. at 377-78.

Thus, by finding Rongstad's claim waived, the Supreme Court of Wisconsin failed to apply the strong presumption against waiver required by this Court's decisions and imposed an unduly heavy burden on Rongstad and future litigants who raise constitutional objections. That decision should be reviewed on the merits, and reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2007

APPENDIX

APPENDIX A

SUPREME COURT
STATE OF WISCONSIN

No. 2004AP377

JULIE M. LASSA,
Plaintiff-Respondent,
v.
TODD RONGSTAD AND THE VALKYRIE GROUP, LLC,
Defendants-Third-Party Plaintiffs-Appellants,

DOES 1-5, IN THEIR INDIVIDUAL CAPACITIES,
Defendants,

AMERICAN FAMILY INSURANCE COMPANY,
Intervenor,
v.
ALEX PAUL,
Third-Party Defendant.

Argued: November 9, 2005

Decided: July 13, 2006.

APPEAL from a judgment of the Circuit Court for Dane County, Maryann Sumi, Judge.

AFFIRMED.

ON CERTIFICATION FROM THE COURT OF APPEALS

¶ 1 ANN WALSH BRADLEY, J.

This case comes to us on certification from the court of appeals. It requires that we address the propriety of discovery and contempt sanctions. Although the underlying defamation lawsuit has been dismissed with prejudice, we must nevertheless address on appeal issues that arose while the defamation case was pending.

¶ 2 The underlying defamation suit was brought by Julie Lassa against Todd Rongstad and others, including unknown defendants, based on a political mailer that criticized Lassa. An organization headed by Rongstad, the Alliance for Working Wisconsin, sent the mailer. Rongstad, along with his company, the Valkyrie Group, LLC, appeals the circuit court judgment adopting the parties' settlement agreement, under which Lassa agreed to dismiss her claim with prejudice and Rongstad agreed to pay $65,000 in attorney's fees and forfeitures as sanctions for failing to comply with discovery orders.[1]

¶ 3 Rongstad asserts that the sanctions in this case cannot stand for essentially four reasons:

(A) The circuit court erroneously exercised its discretion by compelling discovery and imposing sanctions over his claim of constitutional privilege before considering whether Lassa's complaint stated a claim upon which relief could be granted;

(B) The circuit court incorrectly applied the constitutional balancing test under *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), and other cases interpreting it;

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[1] Judge Michael N. Nowakowski presided over the circuit court proceedings until a substitution request resulted in a transfer of the case to Judge Maryann Sumi.

(C) Rongstad made a "substantiated assertion of privilege" under *Burnett v. Alt*, 224 Wis.2d 72, 589 N.W.2d 21 (1999), a case involving expert witness privilege, thus providing him with justification for failing to comply with the circuit court's discovery orders; and

(D) The severity of the sanctions imposed bore no rational relationship to Rongstad's conduct or to the harm suffered by Lassa.

¶ 4 In addition, Rongstad argues that we should exercise our superintending authority to establish an interlocutory appeal as a matter of right in cases involving threatened sanctions for refusal to disclose information based upon claims of constitutional privilege.

¶ 5 We address the issues raised by Rongstad's arguments as follows:

(A) In defamation cases, circuit courts should ordinarily decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to disclose information that would identify otherwise-anonymous members of an organization. Under the circumstances here, however, the circuit court did not erroneously exercise its discretion in compelling discovery and imposing sanctions before deciding Rongstad's motion to dismiss.

(B) The circuit court properly rejected Rongstad's assertion of privilege under the balancing test of the *NAACP* line of cases because Rongstad failed to make the required preliminary factual showing to support his assertion.

(C) *Alt* has no applicability in this case. The showing that Rongstad had to make was the one required under *NAACP*, not a "substantiated assertion" of evidentiary privilege under *Alt*.

(D) We reject Rongstad's challenge to the severity of the $65,000 in attorney's fees and forfeitures because the circuit court did not set that amount-the parties did by stipulation.

Rongstad cannot claim that the amount of $65,000 has no rational relationship to the harm suffered or that the court erroneously exercised its discretion in setting the amount. Rather, the issue of the amount of monetary sanctions was pending before the court when the parties stipulated to $65,000. We also determine that Rongstad's challenge to the sanction of a default judgment on liability is moot under the parties' settlement agreement.[2]

¶ 6 In addition, we decline to exercise our superintending authority to establish an interlocutory appeal as a matter of right in defamation cases involving discovery sanctions that raise questions of a constitutional privilege.[3] Accordingly, we affirm the circuit court judgment. [4]

I

¶ 7 The Alliance for Working Wisconsin is a 501(c)(4) organization whose main purpose is "to educate the public

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[2] Four members of the court are participating in this case. Determinations (A) and (D) above constitute a majority opinion in this case. Three members of the court, Chief Justice Abrahamson, Justice Bradley, and Justice Butler, form the majority in those determinations. *See* concurrence, ¶ 95. In determinations (B) and (C), Chief Justice Abrahamson and Justice Bradley constitute a lead opinion.

[3] A majority of the court in this case, Chief Justice Abrahamson, Justice Bradley, and Justice Butler, declines to exercise our superintending authority to establish an interlocutory appeal as a matter of right in defamation cases involving discovery sanctions that raise questions of a constitutional privilege. *See* concurrence, ¶ 95.

[4] A majority of the court in this case, Chief Justice Abrahamson, Justice Bradley, and Justice Butler, agrees that the circuit court judgment must be affirmed. *See* concurrence, ¶ 95 n. 1.

about public policy issues related to business, taxes and families in Wisconsin on a national, state and local level." A few days before the general election in November 2002, the Alliance sent a mailer criticizing then-State Representative Lassa for alleged connections to then-State Senate majority leader Chuck Chvala.

¶ 8 Among other things, the mailer said that Lassa wanted to become a state senator, so she "hooked up" with Chvala. The mailer also stated that "[n]obody knows for sure what she had to promise to gain his approval."

¶ 9 At the time, Lassa was running for re-election to the Assembly. Also at that time, Chvala had just been charged with 20 felonies, including extortion, misconduct while in public office, and falsifying reports to the State Elections Board. The mailer made this apparent by including images of a newspaper clipping and Chvala's booking photograph.

¶ 10 The mailer concluded with this statement:

> Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa ··· and the rest and ask them the tough questions-did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections?
>
> And, most importantly, will you please clean up your act?

¶ 11 Lassa filed a defamation action against Rongstad, the Alliance, the Valkyrie Group, and five unknown "Doe" defendants in their individual capacities for their role in publishing and distributing the mailer.[5] At the time, she was considering whether to run for her district's state senate seat, soon to be vacant. She immediately sought to depose

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[5] Lassa also named A.M. Mailing Services, Inc., as a defendant. A.M. Mailing's role in the mailer is not relevant to this appeal.

Rongstad in order to ascertain the identities of the "Does" involved in the mailer. During Rongstad's deposition, Lassa asked him questions regarding who from the Alliance may have played a role in the mailer. Rongstad objected, refusing to answer a number of these and related questions and asserting a constitutional privilege.

¶ 12 The parties called the court to obtain a ruling on Rongstad's assertion of privilege. Rongstad argued that Lassa's questions pertained to the membership of the Alliance and therefore involved constitutionally-protected rights of free speech and freedom of association under the First and Fourteenth Amendments. He relied on a number of cases, including *NAACP*, in which the United States Supreme Court invalidated a discovery sanction against the *NAACP* for refusing to disclose membership lists to the State of Alabama in the course of a discovery dispute. Under the principles in those cases, Rongstad contended, Lassa was not entitled to discover the identities of Alliance members.

¶ 13 The court ruled at a hearing the next day, February 4, 2003. It observed that the cases on which Rongstad relied required a preliminary factual showing of a reasonable probability that compelled disclosure of members' identities would subject them to threats, harassment, or reprisals from either government officials or private individuals. The court determined that Rongstad failed to make such a showing. Even if he had, the court determined, the Alliance members' associational rights were outweighed by other interests that the court was required to balance against the members' rights. These other interests, the court explained, included Lassa's interest in clearing her name and the state's interest in preventing fraud and libel, an interest that is heightened during election campaigns.

¶ 14 The court thus overruled Rongstad's constitutional objection to Lassa's questioning. It ordered Rongstad to answer all questions pertaining to the identity of individuals involved in the preparation, funding, or distribution of the

mailer.

¶ 15 Although Rongstad's deposition continued, he moved the court to reconsider its February 4 order and submitted an affidavit in an apparent attempt to make the required factual showing. Specifically, Rongstad averred that members of the Alliance had told him that if he was compelled to disclose the identity of members of the organization, they would no longer be interested in participating in the organization or any such organization for fear of public reprisal and potential legal action. The court again determined that Rongstad failed to make the required preliminary factual showing, deeming his affidavit conclusory and insufficient. Thus, the court denied Rongstad's motion to reconsider, and ordered Rongstad to submit to a continued deposition.

¶ 16 Rongstad also sought to challenge the circuit court's February 4 order in the court of appeals. He petitioned the court of appeals for interlocutory relief, claiming the circuit court committed error in rejecting his assertion of privilege under *NAACP*. Ultimately, however, he failed to pursue the appeal, and on March 4, 2003, the court of appeals dismissed his petition for leave to appeal after the time had lapsed for the filing of arguments.

¶ 17 While Rongstad's petition for interlocutory relief was pending, he filed a motion to dismiss for failure to state a claim on February 11, 2003. He argued in the motion that none of the communications in the mailer was capable of defamatory meaning, as required to survive a motion to dismiss. Within two days, the circuit court set a briefing schedule with reply briefs due on March 28. Rongstad did not object to this schedule or request a different schedule.

¶ 18 In the interim, the parties' discovery dispute continued. On February 21, Lassa filed a motion for "sanctions for failure to comply with court-ordered discovery," asserting that Rongstad had failed to comply with the court's previous orders. She requested that Rongstad be held in contempt

and that the court impose forfeitures under Wis. Stat. § 804.12(2) 4 (2003-04) for any continuing violation of the court's orders.[6] In addition, she requested an award of attorney's fees under § 804.12(2)(b) and a default judgment under § 804.12(2)(a) 3.[7]

¶ 19 At a February 28, 2003 hearing on Lassa's motion, her attorney indicated that the governor had called a special election for April 1 to fill the open state senate seat and that Lassa had decided to run for the seat, making it especially important that she discover as soon as possible who was responsible for the mailer in order to clear her name. She asserted that Rongstad continued to refuse to answer questions concerning anyone who had funded the Alliance

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[6] All references to the Wisconsin Statutes are to the 2003-04 version.

[7] Wisconsin Stat. § 804.12(2) reads in relevant part as follows:

> Failure to comply with order. (a) If a party ··· fails to obey an order to provide or permit discovery, ··· the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> ····
> 3. An order ··· rendering a judgment by default against the disobedient party.
>
> 4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical, mental or vocational examination.
> (b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> Wisconsin Stat. § 785.04(1)(c) authorizes the circuit court to impose a daily forfeiture not to exceed $2,000 as a remedial sanction for each day that a contempt of court continues.

or was a member of the Alliance. Rongstad's counsel reiterated the constitutional issues involved and asserted that, in his view, Rongstad had complied with the court's discovery orders.

¶ 20 Adding to its previous orders, the circuit court ordered Rongstad to disclose the identity of anyone who had contributed $100 or more to the Alliance in 2002. The court postponed hearing Lassa's motion for sanctions, however, because of concerns as to whether Rongstad had been properly served with notice of the motion. Lassa re-filed her motion on March 3, 2003, asserting that Rongstad was in violation of the court's February 28 order in addition to its previous orders.

¶ 21 On March 11, the court heard the motion. It found that Rongstad intentionally failed to comply with the court's orders and that Rongstad was in contempt. The court noted it appeared that Rongstad had lied under oath and that he had given evasive answers designed to avoid providing the information ordered. It imposed a sanction of $32,587 in attorney's fees. In addition, it ordered that beginning March 13, Rongstad would pay a forfeiture in the amount of $1,000 per day until he had fully complied with the court's orders. The court declined to enter a sanction of default judgment against Rongstad, but stated that it would entertain a motion for default judgment on liability issues as a future sanction if Rongstad failed to comply with the court's discovery orders by April 4.

¶ 22 The parties' discovery dispute nonetheless continued and, on April 11, Lassa moved for default judgment against Rongstad on all liability issues, asserting that Rongstad remained in violation of the court's discovery orders. Rongstad filed a motion for relief from sanctions arguing, in contrast, that he was in compliance with the court's discovery orders because he provided Lassa with some documentation relating to contributions to the Alliance. In

addition, he requested that the court address his pending motion to dismiss before proceeding on any other motions.

¶ 23 Consistent with Rongstad's request, the court addressed Rongstad's motion to dismiss before proceeding on the other pending motions. It denied the motion to dismiss on July 8, concluding that the mailer contained communications that were capable of a defamatory meaning.[8]

¶ 24 Several weeks later, on August 15, the circuit court addressed Rongstad's motion for relief from sanctions and Lassa's motion for a default judgment. The court began by thoroughly reviewing the history of the parties' discovery dispute. In a detailed oral decision, the court determined that Rongstad was not in compliance with the discovery orders and that he continued to be in contempt. In addition, the court found that Rongstad's conduct was egregious and in bad faith. The court denied Rongstad's motion for relief from sanctions and granted Lassa's motion for default judgment.

¶ 25 At a subsequent hearing, the court determined that attorney's fees remained an appropriate sanction. Lassa agreed to submit a new statement of attorney's fees for the court's approval, and Rongstad agreed to address the statement and object to fees he deemed unrelated to the discovery dispute. The court withheld decision on the final amount of attorney's fees and on the proper amount of forfeitures for further court proceedings.

¶ 26 Shortly thereafter, the parties instead submitted a settlement agreement to the court. It provided that Lassa would agree to dismiss the underlying defamation claim with prejudice and that Rongstad would consent to a judgment against him for a stipulated amount of $65,000,

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[8] By this point in the proceedings, the case had been transferred from Judge Nowakowski to Judge Sumi.

with $43,000 considered to be contempt-related attorney's fees and $22,000 considered to be forfeitures payable to the school fund. The agreement also stated that Rongstad reserved certain rights to appeal.

¶ 27 The circuit court entered a judgment in accordance with the parties' agreement. Rongstad appealed, and we accepted the court of appeals' certification of the case pursuant to Wis. Stat. § (Rule) 809.61.

II

¶ 28 Because the parties agreed to dismiss the defamation claim underlying this case, we begin with a brief discussion of why this court has jurisdiction over Rongstad's appeal.[9] Stated succinctly, the reason is straightforward: Rongstad is aggrieved by the final judgment entered upon the parties' settlement agreement because it required him to pay $65,000 in sanctions.

¶ 29 By the time the parties agreed to settle their case and dismiss the underlying defamation claim, the circuit court had already imposed discovery and contempt sanctions on Rongstad. More specifically, at the time Rongstad entered into the settlement agreement, the circuit court had imposed over $30,000 in attorney's fees as a discovery sanction, had imposed a $1,000 per day fine for continuing contempt, and had granted Lassa's motion for default judgment. Rongstad was, and remains, aggrieved by the circuit court's orders for discovery and contempt sanctions. Those orders, in turn, are properly before this court as part of Rongstad's appeal from the final judgment entered on the parties' settlement

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[9] In this discussion, ¶¶ 28-36, Chief Justice Abrahamson and Justice Bradley constitute a lead opinion.

agreement. *See* Wis. Stat. (Rule) § 809.10(4). [10]

¶ 30 Although Rongstad advances several grounds for circuit court error, his central contention is that the sanctions orders were unlawful because they were imposed over his assertion of a constitutional privilege. We must address both this contention and other arguments that Rongstad advances in order to decide the propriety of the sanctions.

¶ 31 *NAACP* and *Alt*, two cases on which Rongstad relies, are examples of other instances in which courts were required to address the merits of an assertion of privilege in order to determine the propriety of discovery sanctions. *NAACP*, 357 U.S. at 460-66, 78 S.Ct. 1163; *Alt*, 224 Wis.2d at 84-95, 589 N.W.2d 21. In both cases, the court could not decide whether the sanctions orders were lawful without addressing the assertion of privilege over which the sanctions were imposed. Likewise, here, the validity of the sanctions depends on whether they were properly imposed in light of an asserted privilege.

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[10] Wisconsin Stat. (Rule) § 809.10(4) provides as follows:

> Matters reviewable. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

The concurrence leaps from the general propositions that an order or judgment must be appealable for an appellate court to exercise jurisdiction and that jurisdiction cannot be conferred by consent to the conclusion that "[a]s such, [Rongstad]'s stipulation preserving certain appellate rights was invalid." Concurrence, ¶ 101. One of the linchpins of the concurrence's conclusion is its determination that Rongstad is not aggrieved from "that" judgment in which he "sought and secured a dismissal with prejudice." *Id.*, ¶ 104. This determination is difficult to fathom in light of the sanctions orders and the simple fact that this case involves only one final judgment.

¶ 32 Also somewhat analogous is *Jandrt v. Jerome Foods, Inc.*, 227 Wis.2d 531, 597 N.W.2d 744 (1999). In *Jandrt*, sanctions for maintaining a frivolous lawsuit were at issue. *Jandrt*, 227 Wis.2d at 539, 597 N.W.2d 744. The underlying suit was voluntarily dismissed, but the parties continued to litigate the question of frivolousness. *Id.* at 538, 597 N.W.2d 744. Obviously, the court had to address the merits of maintaining the underlying claim-even though it was dismissed-in order to address the propriety of the sanctions. *See id.* at 572-73, 597 N.W.2d 744.

¶ 33 Although here we need not address the merits of the plaintiff's defamation claim in order to decide the propriety of sanctions, we must address the assertion of privilege, just as in *NAACP* and *Alt*. Rongstad's assertion of privilege is not a defense to Lassa's defamation claim. Rather, it is a defense to the discovery and contempt sanctions.[11]

¶ 34 Of course, an order or judgment must be appealable for an appellate court to exercise jurisdiction, and "consent of the parties involved cannot confer jurisdiction where none

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[11] Again, the concurrence reaches a conclusion that is difficult to understand. It concludes that this court lacks jurisdiction to consider Rongstad's assertion of any privilege because the assertion of such a privilege is a defense to Lassa's defamation claim. Concurrence, ¶¶ 94, 96. The concurrence conflates a defense to the defamation claim with a defense to the discovery and contempt sanctions. In any event, both *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), and *Burnett v. Alt*, 224 Wis.2d 72, 589 N.W.2d 21 (1999), demonstrate that this conclusion is incorrect.

Similarly difficult to understand is the concurrence's belief that this court has jurisdiction over some but not all of the issues presented. *See* concurrence, ¶¶ 94-96. The concurrence does not satisfactorily explain how this court has jurisdiction over some issues but not others, even though all of the issues initially stem from Lassa's now-dismissed defamation claim.

exists." *Heritage Mut. Ins. Co. v. Thoma*, 45 Wis.2d 580, 587, 173 N.W.2d 717 (1970). Nonetheless, parties sometimes settle issues in a controversy, as here, such that the only question or questions remaining are ripe for appeal. Similarly, issues presented on appeal are often at least partly the product of one or more stipulations in the circuit court. *See, e.g., Petta v. ABC Ins. Co.*, 2005 WI 18, ¶ 32, 278 Wis.2d 251, 692 N.W.2d 639 (in which this court's decision was based, in part, on a stipulation that the plaintiffs had not been made whole by a lump-sum settlement); *see also, e.g., Strenke v. Hogner*, 2005 WI 25, ¶¶ 7-8, 279 Wis.2d 52, 694 N.W.2d 296 (parties stipulated to liability but disputed damages); *Weber v. White*, 2004 WI 63, ¶ 5, 272 Wis.2d 121, 681 N.W.2d 137 (parties stipulated that one party was 100% negligent in causing an accident).

¶ 35 Parties may not manufacture artificial issues for appeal. Moreover, a judgment or order must be "final" as defined by rule in order to be appealable as a matter of right. Wis. Stat. § (Rule) 808.03(1); *see also Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis.2d 265, 269, 569 N.W.2d 45 (Ct.App.1997) (party "cannot, by stipulating to the entry of a conditional judgment, obtain a mandatory appeal of an interlocutory order"). Here, however, the parties' settlement and the judgment entered upon it do not implicate manufactured issues. They also do not run afoul of the finality requirement.[12]

¶ 36 Having briefly addressed why this court has jurisdiction over Rongstad's appeal, we turn to the merits of Rongstad's arguments. His arguments raise issues involving sanctions for a party's failure to comply with discovery orders and a related contempt of court. Appellate courts

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[12] The settlement agreement and judgment are structured such that regardless of whether Rongstad or Lassa prevails on appeal, no further litigation between them will ensue in this case.

ordinarily review circuit court decisions pertaining to such matters for an erroneous exercise of discretion. *Schultz v. Sykes*, 2001 WI App 255, ¶ 8, 248 Wis.2d 746, 638 N.W.2d 604. However, we independently determine any underlying questions of law. *See Oliveto v. Circuit Court for Crawford County*, 194 Wis.2d 418, 429, 533 N.W.2d 819 (1995); *Evans v. Luebke*, 2003 WI App 207, ¶ 16, 267 Wis.2d 596, 671 N.W.2d 304. The lawfulness of the discovery and contempt sanctions in this case ultimately turns on a question of law subject to independent appellate review: whether Rongstad made the required preliminary factual showing that meets the standard for asserting a constitutional privilege under *NAACP*. *See Vultaggio v. Yasko*, 215 Wis.2d 326, 330, 572 N.W.2d 450 (1998); *State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W2d 50 (1996).

III

A

¶ 37 We begin by addressing Rongstad's assertion that the circuit court erroneously exercised its discretion by compelling discovery and imposing sanctions over his claim of constitutional privilege before considering whether Lassa's complaint stated a claim upon which relief could be granted. Rongstad argues that, in light of the constitutional questions raised by his assertion of privilege, the court should have first decided the motion to dismiss.

¶ 38 Rongstad is joined in this argument by amici American Civil Liberties Union of Wisconsin Foundation, Wisconsin Newspaper Association, Wisconsin Broadcasters Association, Wisconsin Manufacturers & Commerce, Wisconsin Realtors Association, Wisconsin Bankers

Association, and Wisconsin Builders Association.[13] They assert that, given the constitutional rights at stake, a public figure such as Lassa should not be allowed discovery in a defamation action until any pending motion to dismiss has been resolved.

¶ 39 Lassa does not seem to oppose such a procedure in general. Rather, she maintains that based on the particular facts here, the circuit court did not erroneously exercise its discretion by failing to decide Rongstad's motion to dismiss before imposing discovery sanctions.

¶ 40 Cases like the one before us test the bounds of the rights to free speech and freedom of association in the face of other important rights and interests. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462, 78 S.Ct. 1163. Likewise, the decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

¶ 41 At the same time, individual citizens, including candidates for public office, have an interest in being free from defamation. Those who have been defamed have an important interest in clearing their names. In addition, the

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[13] The American Civil Liberties Foundation of Wisconsin submitted the amicus brief it originally filed in the court of appeals, and it also joined in another amicus brief filed after this court accepted certification of the case. Lassa moves to strike the ACLU's original brief, asserting that the ACLU has, in effect, filed two amicus briefs. We agree with Lassa and discourage such practice by amici curiae in future cases. However, because our decision would be the same regardless of any consideration given to the ACLU's original brief, we choose to deny Lassa's motion.

state has a legitimate interest in preventing fraud and libel. *McIntyre*, 514 U.S. at 349, 115 S.Ct. 1511. This interest "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id.* Stated another way, the voting public has a weighty interest in accurate information about candidates for public office. The right of voters to get accurate information is essential to the election process. While non-defamatory, protected speech may often further the voters' interest, defamatory speech assuredly undermines it.[14]

¶ 42 Certainly, a defamation plaintiff should not be able to employ the rules of discovery to obtain the identity of an anonymous political speaker simply by filing a complaint that is facially unsustainable. The speaker has most likely chosen anonymity for a reason. If that reason is consistent with First Amendment principles, the use of discovery to uncover the speaker's identity may chill the exercise of the right to free speech. Such a use of the discovery process also violates the basic principle that litigants are not entitled to discovery that causes unreasonable annoyance, embarrassment, or oppression. *See* Wis. Stat. § 804.04(3); *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis.2d 210, 232, 594 N.W.2d 370 (1999). [15]

¶ 43 Yet, the constitution cannot work as an absolute bar to a plaintiff's interest in discovering the identity of a speaker

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[14] There is no shortage of cases involving claims of defamation by candidates for public office against those who have criticized them. *See, e.g., Tatur v. Solsrud*, 174 Wis.2d 735, 498 N.W.2d 232 (1993); *D'Amato v. Freeman Printing Co.*, 38 Wis.2d 589, 157 N.W.2d 686 (1968); *Frinzi v. Hanson*, 30 Wis.2d 271, 140 N.W.2d 259 (1966).

[15] We note that there is no real dispute in this case that Rongstad and the Alliance were the only source of the information that Lassa was seeking to discover.

who has actually defamed her. If it did, anonymous speakers would be free to make false statements causing harm to others no matter how malicious or damaging. Freedom of speech has its limits. It does not embrace defamation. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

¶ 44 One way to reconcile all of these competing rights and interests, according to Rongstad and the amici, is to require that circuit courts decide whether a defamation complaint states a claim on which relief may be granted before imposing sanctions for the refusal to disclose information based on the type of constitutional privilege Rongstad has asserted. Such a procedure, they argue, helps ensure protection of the constitutional rights at stake.

¶ 45 On a motion to dismiss, the court must determine whether a communication is "capable of a defamatory meaning." *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis.2d 1, 10, 287 N.W.2d 747 (1980). This means that if the communication cannot reasonably be understood as defamatory, then the plaintiff has failed to state a claim, and the motion to dismiss must be granted. *Id.*; *see also Tatur v. Solsrud*, 174 Wis.2d 735, 740, 498 N.W.2d 232 (1993); *Frinzi v. Hanson*, 30 Wis.2d 271, 276, 140 N.W.2d 259 (1966).

¶ 46 Few appellate courts have been asked to determine whether such a procedure should be followed, although the question has reached at least one other state supreme court. In *Doe v. Cahill*, 884 A.2d 451 (Del.2005), the Delaware Supreme Court was confronted with the question of what procedure to follow when a public figure defamation plaintiff seeks to discover the identity of an anonymous speaker criticizing the plaintiff via internet postings.

¶ 47 The Delaware court was presented with a range of possible procedures to use in order to strike the proper balance between the competing rights and interests. The court explained:

> Before this Court is an entire spectrum of "standards" that could be required, ranging (in ascending order) from a good faith basis to assert a claim, to pleading sufficient facts to survive a motion to dismiss, to a showing of prima facie evidence sufficient to withstand a motion for summary judgment, and beyond that, hurdles even more stringent.

Cahill, 884 A.2d at 457.

¶ 48 The court thoroughly described the particular concerns with which it was faced:

> We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." Plaintiffs can often initially plead sufficient facts to meet the good faith test ··· even if the defamation claim is not very strong, or worse, if they do not intend to pursue the defamation action to a final decision ····
>
> Indeed, there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. As one commentator has noted, "[t]he sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money." "The goals of this new breed of libel action are

> largely symbolic, the primary goal being to silence John Doe and others like him." This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked.

Id. at 457 (footnotes omitted; citations omitted).

¶ 49 Given these concerns, the Cahill court concluded that "even the more stringent motion to dismiss standard, the middle option in the spectrum of standards from which we may choose, falls short of providing sufficient protection to a defendant's First Amendment right to speak anonymously." *Id.* at 458. Thus, the court held that "before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion." *Id.* at 460.

¶ 50 Although we share the *Cahill* court's concerns and think them fully applicable to the case at bar, we reach a somewhat different conclusion. It appears that Delaware, unlike Wisconsin, does not require particularity in the pleading of defamation claims. *See id.* at 458; *cf.* Wis. Stat. § 802.03(6).[16] The court in *Cahill* noted that "even silly or trivial libel claims can easily survive a motion to dismiss

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[16] Wisconsin Stat. § 802.03 provides in relevant part:

> Pleading special matters ····
>
> ····
>
> (6) Libel or slander. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

where the plaintiff pleads facts that put the defendant on notice of his claim, however vague or lacking in detail these allegations may be." *Cahill*, 884 A.2d at 458.

¶ 51 In addition, the Delaware court emphasized that one of the most important aspects of testing a defamation claim by summary judgment is that the claim must be "capable of a defamatory meaning" in order to survive summary judgment. *Id.* at 463. This, of course, is the same inquiry that is the focus of a motion to dismiss a claim for defamation in Wisconsin. *See, e.g., Starobin*, 94 Wis.2d at 10, 287 N.W.2d 747.

¶ 52 Accordingly, we determine that under Wisconsin law, requiring the circuit court to decide a motion to dismiss before compelling disclosure and imposing sanctions best addresses the concerns expressed in *Cahill*. When faced with an assertion of constitutional privilege against disclosure of information identifying otherwise-anonymous organization members, the circuit court should decide a pending motion to dismiss for failure to state a claim before sanctioning the party for refusing to disclose that information.

¶ 53 Having determined that, prospectively, this is the procedure that circuit courts should ordinarily follow, we nonetheless agree with Lassa that the circuit court did not erroneously exercise its discretion here even though it imposed some discovery sanctions before addressing Rongstad's motion to dismiss.

¶ 54 Early in the litigation, Rongstad informed the circuit court that he intended to bring a motion to dismiss. He did not, however, argue that the court was required to decide the motion before discovery proceeded. When Rongstad filed his 17-page motion and supporting brief, he also advanced no such argument. Likewise, when the circuit court made its discovery rulings and when it initially imposed sanctions on March 11, 2003, Rongstad did not present the argument.

¶ 55 The court issued a briefing schedule on Rongstad's motion to dismiss within two days of the date that Rongstad filed the motion, February 11, 2003. Under the briefing schedule, reply briefs were due approximately six weeks later, yet Rongstad did not file any objection to the schedule or request an accelerated schedule. In addition, he did not file any objection when his insurer moved on February 19 to intervene and stay the merits of the case pending resolution of coverage issues.

¶ 56 At the very earliest, it was not until April 30, 2003, that Rongstad first apprised the court of the argument he now advances, that the court was required to decide his motion to dismiss before compelling discovery. On that date, Rongstad filed a letter with the court in which he requested that it address his motion to dismiss before resolving any other pending motions because this would "eliminate the need for any further action." In our view, however, even this April 30 letter did not apprise the circuit court of the argument Rongstad now makes.

¶ 57 In any event, by the time of Rongstad's April 30 letter, the court had already compelled discovery and ordered sanctions. It then decided his motion to dismiss before proceeding to impose further sanctions. The court imposed no additional sanction until after it denied the motion.

¶ 58 In short, Rongstad did not raise his argument that the circuit court was required to address his motion to dismiss before it compelled discovery until after the court imposed discovery sanctions. Moreover, the argument that the constitutional dimension of the parties' discovery dispute mandated this course of action was a relatively novel one

considering existing law at the time.[17] Given all of the circumstances, the court did not erroneously exercise its discretion in compelling discovery and imposing some

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[17] The dissent imparts a spin to both the facts and the law. Contrary to what it first insinuates over the course of nine paragraphs, *see* dissent, ¶¶ 124-129, 139, 169-170, and then expressly concludes based on several more paragraphs of nuanced explanation, *see id.*, ¶¶ 172-178, there is no real indication in the record of Rongstad's argument until April 30, 2003, at the earliest. By suggesting otherwise, the dissent elevates the "silk purse from a sow's ear" aphorism to new levels. The dissent apparently thinks that if it underlines the words "motion to dismiss" enough times, it can summon facts from the record that do not exist. *See id.*, ¶¶ 124-126, 128-129, 169.

Likewise, none of the legal authorities that the dissent cites (or that Rongstad cited in the circuit court) would have apprised the circuit court that Rongstad was arguing the court must address his motion to dismiss before imposing discovery and contempt sanctions. Those authorities do not address whether circuit courts should decide a pending dispositive motion in a defamation case before resolving discovery disputes. As we have indicated in the body of this opinion, *Doe v. Cahill*, 884 A.2d 451 (Del.2005), which was decided more than two years after the circuit court denied Rongstad's motion to dismiss, appears to be one of the few cases to address such an issue.

The dissent relies, for example, on the Law Note for Judges on defamation that is found in the pattern jury instructions. *See* dissent, ¶ 173 (citing Wis. JI-Civil 2500). Rongstad cited the Law Note in his brief in support of his motion to dismiss and provided the Law Note to the circuit court along with his April 30 letter. The Law Note, however, simply acknowledges that the initial substantive inquiry in a defamation case is usually whether the words at issue are capable of defamatory meaning, a question for the trial judge that is normally presented by a motion to dismiss. Wis. JI-Civil 2500, at 3. The Law Note provides no guidance as to how this procedure in the usual defamation case should interact with discovery disputes, let alone the type of discovery dispute here.

sanctions without first deciding Rongstad's motion.[18]

B

¶ 59 We turn to Rongstad's argument that the circuit court incorrectly applied the constitutional balancing test under cases such as *NAACP*. The United States Supreme Court's decision in *NAACP* has come to stand for a balancing test that applies to cases in which an organization or its members or contributors assert a First Amendment privilege in the face of compelled disclosure of member identities or related information. *See, e.g., Black Panther Party v. Smith*, 661 F.2d 1243, 1267-68 (D.C.Cir.1981); *Crocker v. Revolutionary Communist Progressive Labor Party*, 178 Ill.App.3d 401, 127 Ill.Dec. 572, 533 N.E.2d 444, 447-48 (1988).[19] As the following discussion of *NAACP* and other cases shows, the party seeking to assert the privilege must make a preliminary factual showing that at least demonstrates a reasonable probability of an actual chilling effect on First Amendment rights.

¶ 60 In *NAACP*, the attorney general of Alabama brought suit against the *NAACP* alleging that it was unlawfully conducting business in that state. *NAACP*, 357 U.S. at 452,

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[18] Here, as the circuit court recognized, the resolution of the discovery dispute was time-sensitive given the imminent special election for the state senate seat that Lassa had decided to seek. In a similarly time-sensitive case, the court and parties would obviously need to be mindful of expediting any briefing or proceedings necessary to decide a motion to dismiss.

[19] The decision in *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C.Cir.1981), was subsequently vacated by the United States Supreme Court on mootness grounds, *see Moore v. Black Panther Party*, 458 U.S. 1118, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982), but it continues to be cited as providing a sound analysis of the balancing test. *See, e.g., International Action Ctr. v. United States*, 207 F.R.D. 1, 3 n. 6 (D.D.C.2002).

78 S.Ct. 1163. The issue on appeal involved the constitutionality of a large monetary contempt sanction against the *NAACP* for its failure to comply with a discovery order requiring disclosure of its membership lists. *Id.* at 453, 78 S.Ct. 1163.

¶ 61 The Court first recognized that the order "must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Id.* at 462, 78 S.Ct. 1163. In determining that the order was likely to chill *NAACP* members' associational rights, the Court referred to the *NAACP*'s "uncontroverted showing that on past occasions revelation of the identity of rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* The Court then weighed the likelihood of such a restraint on the exercise of members' rights against the state's asserted interests in obtaining disclosure of member identities. *See id.* at 463-65, 78 S.Ct. 1163.[20]

¶ 62 Relying on *NAACP*, the Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), elaborated on what is required under the first part of the balancing test, this time in the context of contributions to political parties. In *Buckley* the Court explained that there must be a factual showing sufficient to demonstrate a "reasonable probability" of threats, harassment, or reprisals, and the Court gave examples of the proof necessary:

> The evidence offered need show only a reasonable probability that the compelled disclosure ··· will subject

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[20] Much as in *NAACP*, the Court in *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960), spoke of "substantial uncontroverted evidence that public identification of persons in the community as members of the [*NAACP*] had been followed by harassment and threats of bodily harm." *Id.* at 524, 80 S.Ct. 412.

> [contributors] to threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

Id. at 74, 96 S.Ct. 612; *see also Black Panther Party*, 661 F.2d at 1267-68 ("[T]he litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure. It need only show that there is some probability that disclosure will lead to reprisal or harassment.").

¶ 63 The Court was thus careful in *Buckley* to ensure that the burden on the party seeking to assert a privilege was not insurmountably high. At the same time, the Court recognized, "[w]here it exists[,] the type of chill and harassment identified in *NAACP v. Alabama* can be shown." *Buckley*, 424 U.S. at 74, 96 S.Ct. 612.

¶ 64 Thus, "[a] subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement." *Dole v. Local Union 375*, 921 F.2d 969, 973 (9th Cir.1990). "The proof offered must be 'objective'-an allegation of 'apprehension' or subjective deterrence of membership or contribution is not sufficient." *O'Neal v. United States*, 601 F.Supp. 874, 879 (N.D.Ind.1985) (citations omitted); *see also Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) ("[a]llegations of a subjective 'chill' " are not an adequate substitute for a claim of specific present objective harm ····).

¶ 65 The court in *Brock v. Local 375*, 860 F.2d 346 (9th Cir.1988), aptly summarizing much of the applicable case law, observed as follows:

> Many courts have grappled with the sufficiency of such a showing. A factor emphasized in each of those decisions is the need for objective and articulable facts, which go

beyond broad allegations or subjective fears.

Brock, 860 F.2d at 350 n. 1 (citations omitted).

¶ 66 Here, Rongstad relies primarily on his own affidavit, consisting of a total of five short statements. Specifically, he averred as follows:

1. That I am a board member and president of the Alliance for Working Wisconsin.

2. That in that position, I had numerous conversations with members of the association over the last several years and recently specifically related to the lawsuit at issue.

3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.

4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in participating in the organization or any such organization, for fear of public reprisal and potential legal action.

5. That disclosure of the names and the attendant loss of confidentiality will likely ruin my business and force me to find a new career.

¶ 67 Rongstad's affidavit is insufficient to establish the required preliminary showing under *NAACP* and its progeny. The affidavit provides no evidence of particular instances of past or present threats, harassment, or reprisals. *See Buckley*, 424 U.S. at 74, 96 S.Ct. 612; *NAACP*, 357 U.S. at 462, 78 S.Ct. 1163. It also does not indicate a pattern of threats or specific manifestations of public hostility against the Alliance or similar groups.

¶ 68 Although a record of past harassment or reprisals is not always necessary, Rongstad has not otherwise established a

reasonable probability of such chilling effects. At most, he established precisely what is ordinarily deemed insufficient: a general statement of subjective fear of reprisal without any basis in objective, particularized facts. Only one of the five statements in his affidavit is directly related to the substance of the required showing, and that statement establishes only that some unspecified number of members have told him they will no longer be interested in participating in the Alliance or other organizations like it based on general fears of reprisal.

¶ 69 We view the case of *Friends Social Club v. Secretary of Labor*, 763 F.Supp. 1386 (E.D.Mich.1991), as persuasive in light of the circumstances here. In *Friends Social Club*, organization members submitted affidavits stating predictions and fears of harassment, including recrimination by political opponents. *Id.* at 1394. The affidavits suggested that disclosure of members' identities might discourage members from further participation. *Id.* The court in *Friends Social Club*, like the circuit court here, deemed such affidavits conclusory and insufficient. *Id.* at 1395. According to the *Friends Social Club* court, the affidavits fell "far short of sustaining a prima facie case" because they did not "set forth an objective factual basis for [the] subjective fears of reprisal from any particular person." *Id.*

¶ 70 Conversely, a comparison of the facts here to a number of other cases in which the factual showing was deemed sufficient underscores that Rongstad has failed to make the required showing. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 98-99, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982) (evidence of threatening phone calls and hate mail, burning of group's literature, destruction of members' property, police harassment, firing of shots at the group's office, and termination of members' employment was sufficient); *Familias Unidas v. Briscoe*, 619 F.2d 391, 395-96, 399 (5th Cir.1980) (evidence of previous arrests, letters warning of liability for fines, and other public opprobrium and threats

of reprisals, was sufficient); Wisconsin Socialist Workers 1976 *Campaign Comm. v. McCann*, 433 F.Supp. 540, 547-48 (E.D.Wis.1977) (series of affidavits showing potential contributors' reluctance to contribute, specific instances of harassment, and widespread surveillance were sufficient); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376-77 (Tex.1998) (testimonial and other evidence was sufficient when it demonstrated specific instances when individuals opposed to group had boycotted affiliated members or encouraged others to do the same); *Crocker*, 127 Ill.Dec. 572, 533 N.E.2d at 447-48 (allegations of surveillance, intimidation, job firings, disciplinary actions, and other reprisals were sufficient where the party seeking discovery had position of authority over party asserting privilege).[21]

¶ 71 Because we determine that Rongstad failed to make the required preliminary factual showing, we need not reach the question of whether there are compelling interests here that would outweigh a constitutional privilege. The circuit court correctly rejected Rongstad's assertion of privilege under *NAACP* and its progeny. Rongstad's assertion of privilege was therefore not an impediment to discovery sanctions in this case.[22]

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[21] *But cf. Britt v. Superior Court*, 20 Cal.3d 844, 143 Cal.Rptr. 695, 574 P.2d 766, 782 (1978) (in which the majority of the court in a four-to-three decision seemingly ignored the need for a preliminary factual showing and the dissent stated that the majority had, without precedent, "expanded *NAACP* to a general abstract principle that the disclosure of any information about associational activities constitutes an impermissible violation of the right to associate" (Richardson, J., dissenting)); *see also Pollard v. Roberts*, 283 F.Supp. 248, 258 (E.D.Ark.1968) (seeming not to require factual evidence that individuals had been subjected to reprisals and instead determining that it would be naïve not to recognize that disclosure of identities would subject at least some of them to reprisals), *aff'd per curiam, Roberts v. Pollard*, 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968).

[22] The dissent inaccurately portrays our opinion as applying the

¶ 72 Before turning to Rongstad's next argument, we pause to address the dissent's treatment of *NAACP* and its progeny. Deeming those cases inapplicable, the dissent dispenses with decades of constitutional law. Dissent, ¶ 158; *see also* dissent, ¶ 146. Worth noting is that this is the case law on which Rongstad has principally relied throughout this litigation. Tellingly, the dissent finds it necessary to evade these cases and their requirement of a preliminary factual showing in order to reach its result.

¶ 73 As window dressing for its result, the dissent then raises the specter of "SLAPP" suits, deeming this case a "SLAPP suit masquerading as a defamation case."[23] Dissent, ¶ 108; *see also* dissent, ¶¶ 159-160. In characterizing this case as a "SLAPP" suit, the dissent seemingly takes on the role of advocate. Rongstad has not characterized this case as a SLAPP suit, has not advanced that we should address it as such, and has not asserted that addressing it as such makes a

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deferential erroneous exercise of discretion standard to the central constitutional issue in this case. *See* dissent, ¶ 110. As we have already explained, the lawfulness of the discovery and contempt sanctions in this case ultimately turns on a question of law subject to independent appellate review: whether Rongstad made the required preliminary factual showing that meets the standard for asserting a constitutional privilege under *NAACP*. *See, e.g., Vultaggio v. Yasko*, 215 Wis.2d 326, 330, 572 N.W.2d 450 (1998); *State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2d 50 (1996).

[23] "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation". *Vultaggio*, 215 Wis.2d at 359, 572 N.W.2d 450 (Bradley, J., dissenting).

difference in the constitutional calculus.[24] Unlike the dissent, we address the arguments that Rongstad makes, and we adhere to the applicable law.

C

¶ 74 We next turn briefly to Rongstad's argument that he made a "substantiated assertion of privilege" under *Burnett v. Alt*, 224 Wis.2d 72, 589 N.W.2d 21 (1999). He argues that *Alt* should apply where a defendant in a defamation action asserts a privilege against disclosure based on the First Amendment.

¶ 75 In *Alt*, this court concluded that a witness has a qualified privilege to refuse to provide expert testimony, absent compelling circumstances. *Id.* at 89, 92, 589 N.W.2d 21. We stated that "[a]lthough the circuit court should not rely on the judgment of the attorneys involved for their self-interested determination that a privilege exists, a substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery." *Id.* at 94, 589 N.W.2d 21 (citation omitted). Thus, under *Alt*, a bald assertion of an evidentiary privilege to refuse to provide expert testimony will not suffice. Rather, the assertion must be "substantiated."

¶ 76 The court in *Alt* did not define what is meant by a "substantiated" assertion of privilege against providing expert testimony. It is apparent, however, that by requiring that the assertion be substantiated, the court was seeking to effectuate the necessary balance between the right of expert witnesses to be free from testifying against their will and the

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[24] We note that the dissent also wanders into the legislative role. It calls upon the legislature to adopt anti-SLAPP statutes even though it concedes that "[u]ntil this case, the term SLAPP suit had been relatively unheard of in Wisconsin jurisprudence." Dissent, ¶¶ 161-162.

needs of the court and litigants for testimony. *See id.* at 88, 589 N.W.2d 21. The requirement of a "substantiated" assertion of the evidentiary privilege discourages illegitimate invocation of the privilege.

¶ 77 In cases involving discovery orders in the face of an assertion of constitutional privilege as here, the balancing test under *NAACP* governs. That balance, which involves considerations different from those in *Alt*, is effectuated by the standards set forth in *NAACP* and the cases interpreting it. Thus, we determine that *Alt* has no applicability here. The showing that Rongstad had to make was the one required under *NAACP* and its progeny, not a "substantiated assertion" of an evidentiary privilege under *Alt*.

D

¶ 78 We now turn to Rongstad's assertion that the severity of the sanctions in this case bore no rational relationship to his conduct or to any harm suffered by Lassa. More specifically, Rongstad argues that the $65,000 in monetary sanctions ($43,000 in attorney's fees and a $22,000 forfeiture payable to the school fund) "bears no rational relationship to Rongstad's refusal to disclose political associations for a mere two months" in light of his claim of privilege and his attempt to seek interlocutory appeal. We reject this argument.

¶ 79 Rongstad's argument incorrectly assumes that the $65,000 in monetary sanctions is an amount of sanctions set by the circuit court, when in fact it is the amount to which the parties stipulated in their settlement agreement. The circuit court never made a final ruling on the amount of monetary sanctions. Rather, the parties stipulated to this amount of sanctions while the issue of the amount of monetary sanctions was still pending before the court. We will not review the amount of monetary "sanctions" agreed to by the parties for an erroneous exercise of circuit court

discretion. The circuit court never had the opportunity to exercise its discretion as to the amount of monetary sanctions it ultimately deemed proper.

¶ 80 Rongstad also asserts that a sanction of a default judgment on liability issues is too severe and bears no rational relationship to the harm suffered. We question whether the parties' settlement agreement and the judgment entered pursuant to that agreement reflect an intent to permit Rongstad to appeal the propriety of the judgment on liability.[25] Regardless, we determine that the agreement and the judgment entered pursuant to the agreement, which dismissed Lassa's claim with prejudice, bar Rongstad from challenging the propriety of the default judgment on liability. The effect of the default judgment on liability is moot under the parties' agreement and the judgment dismissing Lassa's claim with prejudice.

¶ 81 We once again pause to address the dissent, which protests that "it is draconian to subject Rongstad to the heavy, heavy financial sanctions at issue in this case." Dissent, ¶ 183. Lost on the dissent is that the parties stipulated to the amount of monetary sanctions.

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[25] The parties' settlement agreement states that Rongstad "shall have the right to pursue an appeal *with respect to the attorney's fees and forfeitures* on First Amendment grounds ···" (Emphasis added.) The judgment entered on the agreement, while purporting not to waive "any appellate rights," also provides as follows:

> The defendants intend to appeal the appropriateness *of the fees and forfeitures* under the First Amendment, *Alt*, and whether the Courts were justified in the award, and any other applicable legal theories. Rongstad and The Valkyrie Group retain the right to appeal the contempt ruling *on all issues for the stipulated amount of $65,000* with $43,000 in contempt related attorney's fees and $22,000 in forfeitures payable to the School Fund.

(Emphasis added.)

¶ 82 More importantly, in labeling the sanctions "draconian," the dissent turns a blind eye to facts of record that may have justified a circuit court award of monetary sanctions equal to or greater than the amount to which the parties agreed. For example, the circuit court judge who initially presided in this case observed: "Seldom have I seen such an abuse." The court also found that Rongstad had lied under oath, was "highly evasive," and had "engaged in a well-planned effort to cover up" his activities. Similarly, the circuit court judge who later presided concluded that Rongstad's conduct was egregious and in bad faith.

¶ 83 The dissent carefully avoids giving any truck to these facts, instead portraying Rongstad as the victim of a biased circuit court, of a "shrewd and savvy" legislator (Lassa), and now of this court. Dissent, ¶¶ 129, 153, 162, 164 & n. 11, 170, 172, 179, 181-185. Yet, nothing in the record calls into question the impartiality of the circuit court. Likewise, we have taken pains in this opinion to avoid portraying either Lassa or Rongstad in an unfavorable light and to avoid suggesting an improper motive on the part of one party or the other. Perhaps if the dissent had more facts or more law on its side, it could have done the same. Instead, the dissent brings the following quotation to mind: "When you have the facts on your side, argue the facts. When you have the law on your side, argue the law. When you have neither, holler."

E

¶ 84 Finally, we turn to address the question of whether we should exercise our superintending authority to establish an interlocutory appeal as a matter of right in defamation cases involving discovery sanctions that raise questions of a constitutional privilege. Our exercise of the superintending power is limited to situations in which the "necessities of justice" require it. *Arneson v. Jezwinski*, 206 Wis.2d 217, 231, 556 N.W.2d 721 (1996). Moreover, requiring automatic

grants of interlocutory appeal pursuant to this power is generally disfavored. *State ex rel. Hass v. Wisconsin Court of Appeals*, 2001 WI 128, ¶ 24, 248 Wis.2d 634, 636 N.W.2d 707.

¶ 85 Rongstad argues that this case should be controlled by *Arneson*, in which this court concluded that the court of appeals should as a matter of course grant a petition for an interlocutory appeal from a circuit court order denying a state official's claim of qualified immunity in a 42 U.S.C. § 1983 action. *Arneson*, 206 Wis.2d at 219-20, 556 N.W.2d 721. We determined that such a petition would always fall within the criteria for leave to appeal under Wis. Stat. § (Rule) 808.03(2)(a) and (b).[26] *Id.* at 229, 556 N.W.2d 721.

¶ 86 In other contexts, however, the court has declined to exercise its superintending authority to require interlocutory appeals under circumstances that may be viewed as equally compelling to circumstances such as those here. *See Hass*, 248 Wis.2d 634, ¶¶ 2, 20, 636 N.W.2d 707; *State v. Jenich*, 94 Wis.2d 74, 288 N.W.2d 114, modified on reconsideration, 94 Wis.2d 74, 97A-97B, 292 N.W.2d 348 (1980). In *Jenich*, for example, we declined to direct the court of appeals to hear permissive appeals denying motions to dismiss based on double jeopardy claims despite the "serious constitutional

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[26] Wisconsin Stat. § (Rule) 808.03(2) provides:

> Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:
>
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
>
> (b) Protect the petitioner from substantial or irreparable injury; or
>
> (c) Clarify an issue of general importance in the administration of justice.

questions" raised by such claims. *Jenich*, 94 Wis.2d at 97A n. 1, 97B, 288 N.W.2d 114. Rather, we were content to urge the court of appeals to carefully exercise its discretion in considering whether to hear such appeals. *Id.* at 97B, 288 N.W.2d 114.

¶ 87 Here, we follow our approach in *Jenich*, mindful of the rule that automatic grants of interlocutory appeal are generally disfavored. Mandatory interlocutory review of orders that compel or deny discovery when an assertion of constitutional privilege is raised in a defamation case is not foreordained by *Arneson* or otherwise dictated by the necessities of justice. *Cf. Reise v. Board of Regents*, 957 F.2d 293, 295 (7th Cir.1992) ("[E]ven orders to produce information over strong objections based on privilege are not appealable, despite the claim that once the cat is out of the bag the privilege is gone.").

¶ 88 Although defamation cases like the one before us may raise serious constitutional questions, the constitutional questions raised in double jeopardy cases are equally serious. The constitutional rights at stake are adequately protected by the court of appeals' careful consideration of petitions for leave to appeal and by any other review procedure available, such as a petition for a supervisory writ. "[O]rdinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly." *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S.

774, 781-82, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004).[27]

¶ 89 Accordingly, we decline to exercise our superintending authority to establish a right to interlocutory appeal as Rongstad requests. Nevertheless, given the important

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[27] We note that Rongstad did not exhaust all available procedures for appellate review. As previously mentioned, for example, Rongstad initially sought interlocutory relief in the court of appeals from the circuit court's February 4, 2003, order, asserting that the circuit court erred by rejecting his assertion of privilege under *NAACP*. Ultimately, however, the court of appeals dismissed Rongstad's petition for leave to appeal from the February 4 order after he failed to file any argument. The court of appeals concluded "it appears that Rongstad no longer wishes to seek interlocutory review ···."

Likewise, at the March 11, 2003 sanctions hearing, the circuit court observed as follows:

Mr. Rongstad failed to pursue his further opportunity, which was to ask the Court of Appeals to address the merits of my order on an interlocutory appeal basis ···· It was, in effect, abandoned.

And that having been said, Mr. Rongstad's most recent claims that he is going to seek vindication in the Court of Appeals and that that is what explains his conduct and his defiance of this Court's order likewise falls on rather hollow footing. Instead, what it appears virtually certain to be is simply another in the variety of steps that Mr. Rongstad has taken in this litigation to seek delay and to avoid his responsibilities under the law.

In addition, it appears that Rongstad chose not to utilize other mechanisms for interlocutory relief. Lassa sets forth the following background facts in her brief:

On April 1, 2003, the Court of Appeals denied a second petition for leave to appeal and motion for temporary relief filed by Mr. Rongstad seeking review of the court's February 28 and March 11, 2003 orders because the Court does not take permissive appeal[s] on oral orders. Those sanctions orders were reduced to [a] written order on April 2, 2003 ···· Mr. Rongstad did not seek leave for appeal of the April 2, 2003 order.

constitutional issues raised and the consequent need for a timely resolution, we urge the court of appeals to carefully weigh whether there is a need for interlocutory appeal in a given case. Such an appeal may be necessary to protect a party from "substantial or irreparable injury," one of the criteria for testing the appropriateness of an interlocutory appeal under § (Rule) 808.03(2). We trust that the court of appeals will carefully exercise its discretion to grant or deny leave to appeal or other relief as appropriate.

IV

¶ 90 In sum, we hold as follows:

(A) In defamation cases, circuit courts should ordinarily decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to disclose information that would identify otherwise-anonymous members of an organization. Under the circumstances here, however, the circuit court did not erroneously exercise its discretion in compelling discovery and imposing sanctions before deciding Rongstad's motion to dismiss.

(B) The circuit court properly rejected Rongstad's assertion of privilege under the balancing test of the *NAACP* line of cases because Rongstad failed to make the required preliminary factual showing to support his assertion.

(C) *Alt* has no applicability in this case. The showing that Rongstad had to make was the one required under *NAACP*, not a "substantiated assertion" of evidentiary privilege under *Alt*.

(D) We reject Rongstad's challenge to the severity of the $65,000 in attorney's fees and forfeitures because the circuit court did not set that amount-the parties did by stipulation. Rongstad cannot claim that the amount of $65,000 has no rational relationship to the harm suffered or that the court erroneously exercised its discretion it setting the amount. We

also determine that Rongstad's challenge to the default judgment on liability is moot under the parties' settlement agreement.

¶ 91 In addition, we decline to exercise our superintending authority to establish an interlocutory appeal as a matter of right in defamation cases involving discovery sanctions that raise questions of a constitutional privilege. Accordingly, we affirm the circuit court judgment.

The judgment of the circuit court is affirmed.

¶ 92 JON P. WILCOX, N. PATRICK CROOKS, and PATIENCE DRAKE ROGGENSACK, JJ., did not participate.

¶ 93 LOUIS B. BUTLER, JR., J. (concurring).

Todd Rongstad (Rongstad) seeks to assert First Amendment protections before this court in response to Julie Lassa's (Lassa) defamation claim. The action before us is not about Lassa's defamation claim or Rongstad's First Amendment defense, however. This case is about the power of the circuit court to enforce the orders that it lawfully enters during litigation that is pending before it. When viewed in the proper perspective, the resolution of this matter is relatively simple and straightforward.

¶ 94 The majority and the dissent are determined to reach and decide matters that were dismissed as part of a settlement agreement that was accepted by the circuit court. The majority chooses to reach Rongstad's assertions of privilege in determining whether discovery sanctions are appropriate for his refusal to comply with discovery orders. The dissent chooses to reach Rongstad's assertions of privilege as part of deciding the defamation claim. I am not so inclined. The defamation claim has been dismissed, a result sought by Rongstad. That dismissal includes the defenses to the claim, including any assertions of privilege by Rongstad. The dismissal of the defamation claim was part of the settlement agreement between the parties, approved by the court. It's over. The merits of the underlying

defamation action are simply not before us. The assertions of privilege are not before us. To reach out and decide the merits of that dismissed claim and any defense Rongstad had to it would allow Rongstad to have his cake, and eat it too. We should not become so engaged.

¶ 95 The majority concludes that in defamation cases, circuit courts should ordinarily decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to disclose information that would identify otherwise-anonymous members of an organization. Majority op., ¶¶ 5, 90. Because I agree that this approach should be followed by the circuit courts in the future, I concur with and join that portion of the opinion. Likewise, I concur with and join that portion of the decision in which we decline to exercise our superintending authority to establish a right to interlocutory appeal as Rongstad suggests. *Id.*, ¶¶ 6, 89, 91. I also concur with and join that portion of the opinion which holds that under the circumstances here, the circuit court did not erroneously exercise its discretion in compelling discovery and imposing sanctions before deciding Rongstad's motion to dismiss. *Id.*, ¶¶ 5, 90. I finally concur with and join that portion of the opinion that rejects Rongstad's challenge to the severity of the $65,000 in attorney's fees and forfeitures because the parties stipulated to that amount.[28] *Id.*

¶ 96 Because the circuit court dismissed the underlying defamation claim with prejudice, however, I conclude that this court lacks jurisdiction to consider the merits of Lassa's defamation claim, and Rongstad's assertion of any privilege with respect to that claim, including whether the circuit court properly imposed sanctions for a violation of pretrial discovery orders.

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[28] Three members of this court, Chief Justice Abrahamson, Justice Bradley and I, all agree that sanctions in the amount of $65,000 are therefore proper in this matter.

¶ 97 It is axiomatic that in "all cases of appeal or error, there must have been a proceeding, in good faith, an adjudication in an inferior court. This inferior court must have passed upon the case ···" *Webster v. Stadden*, 8 Wis. *225, *228 (1859). "[P]arties cannot, either by failure to raise the question or by consent, confer jurisdiction upon an appellate court to review an order which is not appealable." *Szuszka v. City of Milwaukee*, 15 Wis.2d 241, 243, 112 N.W.2d 699 (1961); *see also Heritage Mut. Ins. Co. v. Thoma*, 45 Wis.2d 580, 586-87, 173 N.W.2d 717 (1970). This court simply has no jurisdiction to entertain an appeal from a nonappealable order. *Gilbert v. Hoard*, 201 Wis. 572, 573, 230 N.W. 720 (1930); *see also Hargrove v. Peterson*, 65 Wis.2d 118, 122, 221 N.W.2d 875 (1974) ("When an order is not appealable, this court lacks subject-matter jurisdiction and any attempted appeal must be dismissed.").

¶ 98 Prior to the reorganization of the court system in 1977, Wis. Stat. § 817.10 provided that any judgment or order was reviewable by a "party aggrieved." *Mutual Serv. Cas. Ins. Co. v. Koenigs*, 110 Wis.2d 522, 526, 329 N.W.2d 157 (1983). That provision was omitted from the 1977 revision of the rules and statutes because it was considered to merely state a fundamental and well-understood concept upon which standing to appeal was predicated:

"The elimination of the phrase in the revisions of the statutes and rules was not intended to change the concept that a person had to be aggrieved by a judgment or order before he could appeal." Martineau and Malmgren, Wisconsin Appellate Practice, sec. 601 (1978).

Id. A person is aggrieved if the judgment bears directly and injuriously upon his or her interests, and the person must be adversely affected in some appreciable manner. *Weina v. Atlantic Mut. Ins. Co.*, 177 Wis.2d 341, 345, 501 N.W.2d 465 (Ct.App.1993); *Ford Motor Credit Co. v. Mills*, 142 Wis.2d 215, 217-18, 418 N.W.2d 14 (Ct.App.1987).

¶ 99 In this action, there is no question that Rongstad has been aggrieved by the sanctions imposed by the circuit court for contempt-related attorney's fees and contempt-related forfeitures.[29] Those sanctions, along with the question of whether the circuit court should decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to comply with the circuit court's discovery orders, are therefore properly before this court.

¶ 100 The underlying merits of Lassa's defamation claim and Rongstad's assertion of privilege with respect to both that claim, as well as to the validity of the discovery sanctions, are an altogether different matter. The parties entered into a settlement, approved by the circuit court, which dismissed the underlying defamation claim with prejudice. Majority op., ¶¶ 26-27. While Rongstad has been aggrieved by the contempt sanctions for refusing to comply with lawful court orders, he simply cannot assert that he has been aggrieved from a judgment in which he prevailed.[30] Wisconsin Stat. § 809.10(4) does not provide Rongstad with a vehicle for appealing the judgment of dismissal entered in

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[29] Once again, it must be noted that Rongstad agreed to be sanctioned, in part to secure a dismissal of the defamation claim against him. This matter is complicated by his attempt to preserve certain issues on appeal as part of the stipulation, notwithstanding the dismissal of the underlying defamation claim.

[30] The majority curiously asserts that Rongstad is "aggrieved" by the final judgment because he entered into a "settlement agreement" that required him to pay $65,000 in sanctions. Majority op., ¶ 28. He agreed to the judgment, which included dismissal of the defamation claim against him, and he agreed to be sanctioned in that amount.

his favor.[31]

¶ 101 It matters not that Rongstad sought to preserve certain of his appellate rights by way of stipulation. *See Coleman v. Percy*, 96 Wis.2d 578, 587, 292 N.W.2d 615 (1980) ("It follows, therefore, that the [parties] lacked authority to create by contract a greater right of judicial review than what they enjoyed by statute."). Parties simply cannot confer jurisdiction upon an appellate court by consent, and an order or judgment must be appealable for an appellate court to exercise its appellate jurisdiction. As such, his stipulation preserving certain appellate rights was invalid.

¶ 102 This matter should be decided on the same footing as this court's decisions in *Lawrence v. MacIntyre*, 48 Wis.2d 550, 553, 180 N.W.2d 538 (1970), and *Gallagher v. Schernecker*, 60 Wis.2d 143, 148-49, 208 N.W.2d 437 (1973). In *Lawrence*, 48 Wis.2d at 553, 180 N.W.2d 538, the appellants appealed from an order dismissing the plaintiff's complaint, an order in their favor. This court appropriately dismissed the appeal,

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[31] The case of *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), did not involve the dismissal of the underlying claim such as occurred here. Instead, the *NAACP* chose to challenge the circuit court's final judgment of civil contempt against the organization in the context of opposing an action to enjoin the organization from conducting further activities in the state. *Id.* at 452-53, 466-67, 78 S.Ct. 1163. Similarly, in *Burnett v. Alt*, 224 Wis.2d 72, 589 N.W.2d 21 (1999), the underlying negligence action had not been dismissed when the issue of contempt arose and was appealed.

That is precisely what should have occurred here. Rongstad could have litigated the underlying defamation claim, any defenses to that claim, and the validity of the discovery orders had he chosen to do so. Instead, Rongstad abandoned, unintentionally perhaps, any opportunity to pursue that defamation claim and any First Amendment defenses to it, as well as the validity of the discovery orders related to the defamation claim, when he agreed to the dismissal of the defamation claim, and the judgment of dismissal was entered by the circuit court.

ruling that the parties were not "aggrieved." *Id.* "We think it elementary that a party may not appeal from a judgment in his favor." *Id.* (citation omitted).

¶ 103 Similarly, in *Gallagher*, 60 Wis.2d at 148-49, 208 N.W.2d 437, this court held that where an appellant seeks an order vacating an arbitration award and secures such an order, "[a]s the moving party who prevailed, he is not an aggrieved party with the right to appeal the order vacating the award."[32] *See also Edlin v. Soderstrom*, 83 Wis.2d 58, 64, 264 N.W.2d 275 (1978) (where the complainant had sought the relief granted by other portions of the judgment, and as to those parts of the judgment he was not an aggrieved party and could not appeal); *Thoma*, 45 Wis.2d at 588, 173 N.W.2d 717 (a "defendant cannot appeal from the judgment which grants the nonsuit he sought and secured.").

¶ 104 Rongstad sought and secured a dismissal with prejudice of Lassa's defamation claim. He is not an aggrieved party as to that judgment. This court is therefore deprived of jurisdiction to decide the merits of that action and any orders entered as part of that action, including any defenses to it. Consequently, I would not reach the questions of whether the circuit court incorrectly applied the constitutional balancing test under *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), or whether Rongstad made a "substantiated assertion of privilege" under *Burnett v. Alt*, 224 Wis.2d 72, 94, 589 N.W.2d 21

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[32] Because respondent cross-appealed from the order vacating the award, which was appealable as to the respondent, the issues were before the court and resolved on the merits. *Gallagher v. Schernecker*, 60 Wis.2d 143, 149, 208 N.W.2d 437 (1973).

(1999).[33] I respectfully decline to join those portions of the majority opinion. If Rongstad wanted this court to reach these issues, he should have litigated them on the merits before the circuit court.

¶ 105 Rongstad was found in contempt by the circuit court for intentionally failing to comply with the court's orders to provide discovery to Lassa. "The court noted it appeared that Rongstad had lied under oath and that he had given evasive answers designed to avoid providing the information ordered." Majority op., ¶ 21. The circuit court found Rongstad's conduct to be "egregious and in bad faith." Majority op., ¶ 24. Sanctions, including attorney's fees, were ultimately imposed against Rongstad for his contempt of court.[34] While the amount of the sanctions imposed is properly before this court, there is no doubt that Rongstad intentionally failed to comply with the circuit court's discovery orders. Majority op., ¶ 21. Rongstad simply has no right to willfully disobey a lawful court order just because he disagrees with it.

¶ 106 Rongstad had to abide by the terms of the discovery order, even if erroneously entered, until he either succeeded in reversing the order in the trial court or through the

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[33] Both the majority opinion and the dissent have chosen to address some of the First Amendment concerns raised by Rongstad in this appeal. This would be entirely appropriate, had this matter been fully litigated at the circuit court level to conclusion. As the circuit court has dismissed the underlying claim with prejudice, any relevance regarding First Amendment concerns would be now limited to the question of whether the circuit court should assess attorneys' fees against Rongstad, as opposed to whether the circuit court should have ordered sanctions in the first instance. *See* Wis. Stat. § 804.12(2)(b).

[34] It is not clear whether those sanctions were imposed pursuant to Wis. Stat. §§ 785.04(1) and 804.12(2)(a) 4., or whether they were imposed pursuant to Wis. Stat. § 804.12(2)(b).

applicable review process. *See State v. Orethun*, 84 Wis.2d 487, 490, 267 N.W.2d 318 (1978) ("Where a court has jurisdiction over the subject matter and the parties, the fact that an order or judgment is erroneously or improvidently rendered does not justify a person in failing to abide by its terms.") (citation omitted); *Anderson v. Anderson*, 82 Wis.2d 115, 118-19, 261 N.W.2d 817 (1978); cf. *Kett v. Cmty. Credit Plan, Inc.*, 222 Wis.2d 117, 128, 586 N.W.2d 68 (Ct.App.1998) ("A voidable judgment ··· has the same effect and force as a valid judgment until it has been set aside."). The only way he could refuse to follow the order was if that order was found to be void and therefore did not need to be obeyed. *See State v. Campbell*, 2006 WI 99, ¶¶ 42, 49, --- Wis.2d ----, 718 N.W.2d 649. Because the underlying matter was dismissed as part of the settlement agreement entered into by Rongstad, the discovery order was never held to be void. The circuit court was thus fully justified in enforcing its order.

¶ 107 For the foregoing reasons, I respectfully concur.

¶ 108 DAVID T. PROSSER, J. (dissenting).

This is a SLAPP suit masquerading as a defamation case.[35] A SLAPP suit represents an attempt to chill First Amendment rights by bringing a tort suit, such as defamation. Like a defamation case, this suit implicates important issues of constitutional law.

¶ 109 The United States Supreme Court has prescribed the standard for reviewing limitations on political speech, declaring that "[w]hen a law hinders core political speech, we apply 'exacting scrutiny' and we uphold the restriction

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[35] SLAPP is an acronym for Strategic Lawsuit Against Public Participation. *Vultaggio v. Yasko*, 215 Wis.2d 326, 359, 572 N.W.2d 450 (1998) (Bradley, J., dissenting); *Briggs v. Eden Council*, 19 Cal.4th 1106, 81 Cal.Rptr.2d 471, 969 P.2d 564, 565 n. 1 (1999).

only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Although this case involves review of judicial determinations affecting speech rather than the application of a speech-restrictive statute, the standard we apply should be no less rigorous. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

¶ 110 The majority sees it differently. It does not apply exacting scrutiny to the circuit court's decision to compel discovery and impose sanctions. Instead, it applies the deferential erroneous exercise of discretion standard, as though this standard adequately safeguards First Amendment freedoms. I cannot agree.

I. BACKGROUND

¶ 111 The facts and context are critical to the proper resolution of the constitutional issues in this case, and thus they are reported at some length.

¶ 112 The plaintiff, Julie Lassa, is a Democratic state senator from Stevens Point. She was elected to the Assembly in 1998, 2000, and 2002, and elected to the Senate in a special election on April 29, 2003.[36]

¶ 113 In 2002, shortly before the general election, the defendant, Todd Rongstad, caused a mailing to be sent to voters in Representative Lassa's 71st Assembly District, as well as some voters in other areas that make up the 24th Senate District. The mailing consisted of an oversized two-sided postcard. One side of this mailing shows a colored photograph of Lassa jumping, with her shoes off, in the rotunda of the State Capitol, in front of a group of students.

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[36] State of Wisconsin Blue Book at 66 (2005-06 ed.).

The smiling face of then-Senator Charles Chvala is superimposed, like multiple colored masks, on the students' heads.

¶ 114 The bottom of this first side reproduces a Milwaukee Journal Sentinel headline reporting, "Chvala charged with extortion, State Senator faces 20 felony counts, up to 85 years in prison." At the top of the jumping picture in bold type is the name "Julie Lassa." At the bottom of the picture is the phrase "When Chuck Said Jump ···"

¶ 115 On the other side of the card the following text is printed over the photograph of Senator Chvala's mug shot:

Lassa Wanted To Be A State Senator, So She Hooked Up With Chuck Chvala.

A Tale of Wisconsin Politics

One day, Julie Lassa decided she wanted to be a state senator. So she asked Senate Leader Chuck Chvala if she could, and he said okay.

Nobody knows for sure what she had to promise to gain his approval. But Chuck wanted a more compliant senator, so he got to work.

What he did best was fundraise with unsubtle threats. Populist Chvala even sponsored a Lassa fundraiser at the state's ritziest country club.

Chvala didn't care much for dissent. And he was giddy with the idea of Senator Julie.

Just like the old days when party bosses made decisions for us all.

But then Lassa's mentor was charged with 20 felonies and *things fell apart.*

The End?

Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone

> completely astray. Please call Julie Lassa ··· and the rest and ask them the tough questions-did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections?
>
> And, most importantly, will you please clean up your act?

¶ 116 This side of the card also carries two small photographs of Lassa as well as a space for a mailing address. In two places, the mailing indicates that it was produced by "The Alliance for a Working Wisconsin" (the Alliance) with a post office box in Waunakee, Wisconsin.

¶ 117 The mailing was designed to embarrass Lassa by linking her to Senator Chvala, who had recently been charged with several campaign-related offenses. The apparent motive for the mailing was to discourage Lassa from running for the state senate should the 24th District senate seat become vacant, or to weaken her candidacy if she made such a race.

¶ 118 The 2002 mailing had no effect on Lassa's election to the Assembly, as she was re-elected with 73 percent of the vote, a higher percentage than she received in 2000.

¶ 119 At that time, the 24th Senate District was represented by Senator Kevin Shibilski, also a Democrat. Senator Shibilski had angered some members of his party, including Senator Chvala, when he voted for a Republican-sponsored budget "repair" bill in 2002. The residual effect of his vote surfaced later in the year when Senator Shibilski was defeated by Barbara Lawton in a statewide Democratic primary for lieutenant governor.

¶ 120 After the 2002 election, Senator Shibilski was designated by Governor-elect James Doyle as the new Secretary of Tourism. He resigned his senate seat in early January, which led eventually to a special election to fill the vacancy.

¶ 121 On January 16, 2003, Lassa filed suit against Rongstad, alleging defamation. Lassa's complaint stated in part:

> [1.] Lassa has not made a decision whether to run for [Shibilski's] vacated seat as of this [date].
>
> [2.] Lassa was not a candidate for State Senate as alleged in the text of the mailer-postcard and Lassa did not ask for help from Chvala to run for the State Senate, a seat then occupied by Democratic Senator Kevin [Shibilski] ···
>
> [3.] The message falsely asserts to citizens receiving the mailer-postcard a) that Lassa was running for the Senate; b) that she was doing so at the demand of Chvala who was, at the time of the mailing, under indictment on 20 felony counts; and c) that Lassa was involved in the conduct that led to the indictment of Senator Chvala.
>
> [4.] The bottom of the mailer-postcard shows a picture of Lassa directly to the right of the following text that is superimposed over what appears to be the booking information from the Dane County Sheriff's office for the arrest of Chvala:
>
> Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa ··· and the rest and ask them the tough questions-did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections? And, most importantly, will you please clean up your act?
>
> [5.] The message falsely and maliciously asserts to her constituents that Lassa engaged in "extortion," "misconduct in public office," "pay to play," as well as "lying, cheating and stealing."
>
> [6.] Lassa has not engaged in such illegal activity ··· and is not involved in the Chvala matter in any way.
>
> [7.] The mailer-postcard was published out of ill will and an intent to destroy Lassa's political reputation in the

community and any opportunity she might have to run for the State Senate and other political positions in the future.

[8.] Defendants have caused to be communicated and published a false and malicious statement regarding Plaintiff's conduct.

[9.] Plaintiff has been injured by the false and malicious communication by lowering her in the estimation of her constituents and other citizens of the state.

[10.] As a direct and proximate result of the defamatory statements, Plaintiff has suffered compensatory damages, including but not limited to loss of future earnings and opportunities, humiliation, damage to her reputation, emotional distress, pain and suffering and costs incurred in bringing this action, all in amounts to be determined.

¶ 122 The summons issued to Rongstad advised him that he had 45 days after service to file a written answer to the complaint. However, on January 16, the same date as the filing, the plaintiff's attorney, Edward Garvey, issued a subpoena duces tecum commanding Rongstad to appear at Garvey's office on January 30 for a deposition. The subpoena also commanded Rongstad to bring "any and all documents relating to the Complaint filed in this matter."

¶ 123 On January 23, Rongstad's attorney, Michael P. Crooks, advised Attorney Garvey that the January 30 date was not convenient, either for him or for defendant Rongstad. Having received no response by January 27, Attorney Crooks filed a motion with the court for a protective order postponing the deposition. In this motion, Attorney Crooks asserted that the action and subpoena were not served upon the defendant until January 22, the day before he wrote to Attorney Garvey. Thus, he claimed, the plaintiff had "subpoenaed Defendant Rongstad for a deposition scheduled 39 days before he is even required to

file an answer."

¶ 124 In the January 27 brief accompanying the motion, Attorney Crooks asked for time to answer the complaint. "Defendants also anticipate filing a *motion to dismiss* the summons and complaint. Again, forcing Defendant Rongstad to undergo a deposition prior to a resolution of these preliminary matters subjects him to annoyance, oppression, undue burden and *expense*." (Emphasis added.)

¶ 125 In a second filing on January 28, Attorney Crooks swore in an affidavit:

> That as mentioned in the initial moving papers, your affiant plans on filing a *motion to dismiss* the complaint in its entirety, as the same fails to state a claim upon which relief can be granted. [The] *defendants request an adjournment of any depositions until after the Court has an opportunity to hear said motion.* (Emphasis added.)

¶ 126 On January 28, Defendant Rongstad also filed an affidavit with the court, explaining why January 30 was inconvenient and stating, "[Y]our affiant has ordered his attorneys to file a *motion to dismiss* the case, based upon his belief that it is meritless and done for political purposes, rather than for pursuit of actual damages." (Emphasis added.)

¶ 127 On January 29, 2003, Dane County Circuit Judge Michael N. Nowakowski heard the motion to quash Attorney Garvey's subpoena for the January 30 deposition. Attorney Crooks began his presentation with the observation that "within the lawsuit I think we're ··· entering real dangerous grounds. If the Court allows this to go forward, the Court is essentially sanctioning a system where we put process ahead of what is purported to be a legitimate lawsuit."

¶ 128 Rongstad's attorney argued that the purpose of the suit was political. "[W]e intend to file a *motion to dismiss* the entire lawsuit within a week to 10 days···· [To] subject

[Rongstad] to the deposition process under the guise of a legitimate lawsuit is not right." (Emphasis added.)

¶ 129 The circuit court was not impressed. The court chastised counsel for not knowing whether he and Rongstad, who was not present, were available for a January 31 deposition, yet it refused counsel's request to call his office. The court said:

> I will make this point with respect to some of the contentions that you've raised. There is no basis under the law to say that simply because someone has only recently been served and represents that they intend to file a *motion to dismiss* the case that they are therefore immune from or not subject to having their deposition taken. That simply is not a principle of law that applies. (Emphasis added.)
>
> ....
>
> The other thing that is apparent ··· is that there are other defendants who have not been served, have not been named and have only been identified as Does that Mr. Garvey and his client are entitled to try and find out who they are ····

¶ 130 Ultimately, the parties agreed to a deposition on Monday, February 3, 2003. At that deposition, Rongstad declined to answer certain questions on constitutional grounds, on the advice of counsel.

¶ 131 At a hearing the following day, February 4, Rongstad's attorney stressed that Rongstad accepted full responsibility for the mailing, but he objected to comprehensive questioning about membership in Rongstad's organization and the speed with which the discovery was proceeding.

¶ 132 In rebuttal, Attorney Garvey argued: "There is a special election that is coming up. We now know that that seat is vacant, and therefore, I think it is extremely important

that we get to the bottom of this as quickly as possible."[37]

¶ 133 The court declared:

> This is a private lawsuit in which an individual citizen seeks injunctive relief and damages on the basis of her allegations that she has been defamed .... The suit asserts common law rights ...
>
> ... [T]he interests to be weighed are different in this setting than in the pure government enforcement arena.

¶ 134 The court distinguished *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), cited by Rongstad, on grounds that Lassa represented a different kind of interest than the state government of Alabama:

> The purely private interest of any citizen in his or her good name has long been recognized as worthy of the careful protection of the law. While the plaintiff by voluntarily injecting herself into the public spotlight by becoming a candidate for public office is expected to live with certain attacks on her good name that a purely private person might not have to suffer, she does not forfeit entirely the law's protection.
>
> ....
>
> Were I to sustain the objection to the questions at issue ... the practical effect would be to grant these unknown participants in the alleged defamation ... the absolute immunity that the Supreme Court was so careful to eschew.
>
> The objections are overruled, and the defendant *Rongstad is ordered to answer all questions inquiring as to the names and behavior of any other persons involved*

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[37] Governor Doyle did not issue an executive order for an April 1 primary and an April 29 special election until February 19, 2003. *See* Executive Order No. 4 (Feb. 19, 2003).

in the preparation, funding or distribution of the mailing. (Emphasis added.)

¶ 135 Early on, the court rejected Rongstad's request to file briefs on the issues, and, after its ruling, the court rejected a stay so that Rongstad could seek a supervisory writ.[38] The court underlined its position: "The suggestion that [Rongstad] and his counsel have been denied the opportunity to make presentation on the two issues that were alluded to by Mr. Crooks is simply unfair, is an unfair characterization of what transpired ··· when I was unexpectedly confronted with this issue."

¶ 136 On February 6, after "roughly 10 hours" and over 400 pages of deposition, Rongstad asked the court to hear a motion for reconsideration. Attorney Crooks argued that Lassa claimed that she was defamed "in the context of her position as a State Representative and potentially a State Senator. She is an officer of the State of Wisconsin, and I believe as a result of that that the state action cases are applicable to the Court's analysis." Moreover, he said, the court's order itself constituted "state action."

¶ 137 The court denied the motion for reconsideration and stated, "[I]t's a sad day in our political system when somehow this kind of activity is covered up and evaded. Seldom have I seen such an abuse."

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[38] Rongstad promptly asked the court of appeals to stay the circuit court's order "to answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing." On February 4, the court of appeals denied the petition. On April 1, the court of appeals denied Rongstad's request for leave to appeal and his motion for temporary relief. On the same day, April 1, the court of appeals denied Rongstad's request for a supervisory writ. The majority characterizes Rongstad's actions as failure "to pursue the appeal," majority op., ¶ 16, and failure to "exhaust all available procedures for appellate review." Majority op., ¶ 88, n. 27.

¶ 138 On February 10, Rongstad filed an answer to the complaint. For affirmative defenses, Rongstad asserted that the complaint failed to state a claim upon which relief may be granted; the statements in the postcard were not defamatory; the statements in the postcard were substantially true; the defendant's conduct was privileged; and the statements, because they related to Lassa's "actions as a public official," were entitled to greater protection from liability than if they had been made against a private individual.

¶ 139 The following day, February 11, Attorney Crooks filed a motion to dismiss, together with a 15-page brief discussing the constitutional principles and facts supporting the motion.[39]

¶ 140 On February 18 the court heard argument on a motion by Attorney Garvey for a protective order to quash a subpoena to depose Lassa. The court granted the motion, delaying any deposition of Lassa until after March 15.

¶ 141 On February 21 Lassa moved for sanctions. She requested that Rongstad be held in contempt and that the court impose forfeitures for any continuing violation of the court's orders. Hearings were held on February 28 and March 11. The court imposed a sanction of more than $32,000 in attorney fees and ordered, beginning March 13, that Rongstad pay a forfeiture of $1000 per day until he complied with the court's orders.

¶ 142 On April 1, Lassa handily won a Democratic primary

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[39] The majority plays up the circuit court's February 13 briefing schedule, which gave Lassa only one month to answer Rongstad's brief on the motion to dismiss. Majority op., ¶¶ 17, 55. Lassa filed her reply brief on March 14. By that time, the court had held Rongstad in contempt, imposed attorney fees, and ordered that Rongstad pay a forfeiture of $1000 per day until he complied with the court's orders.

election for the senate, defeating Attorney Alex Paul, who was ultimately exposed as having financed the 2002 mailing. In expensive primary advertising, Paul promoted themes that paralleled the postcard, prompting Attorney Garvey to publicly threaten to depose Paul's campaign to determine whether Paul had anything to do with the mailing. *Paul, Lassa squabble over ads*, Stevens Point J., Mar. 21, 2003. In the April 29 special election, Lassa was elected to the senate, winning more than 61 percent of the vote.

¶ 143 On July 8, 2003, long after the election, a different Dane County judge denied the defendant's February 11 motion to dismiss. On August 15 the court granted Senator Lassa's motion for default judgment. By stipulation, the amount at stake in this review is $65,000.

II. ANALYSIS

¶ 144 This case was commenced as a defamation suit by a public official who was criticized during a contested election campaign. Because of its facts, the case is at the epicenter of First Amendment principles, inasmuch as it involves not only the heavily protected freedom to criticize government officials, *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) and Sullivan, but also the right to facilitate political speech through the expenditure of money, *Buckley v. Valeo*, 424 U.S. 1, 19, 22-23, 47-51, 54, 57-58, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); the right to anonymous speech, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); the right to associate with others for expression purposes and the right to privacy in those associations, *NAACP*, 357 U.S. at 462, 78 S.Ct. 1163.

¶ 145 Because this case involves review of judicial determinations affecting political speech, this court must apply exacting scrutiny to these determinations. *Sullivan*, 376 U.S. at 265, 84 S.Ct. 710. From the outset, before it acceded to Lassa's request to compel Rongstad to disclose the

membership of the Alliance, the circuit court should have ensured that its discovery order was "narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347, 115 S.Ct. 1511.

¶ 146 The majority identifies two state interests, the interest of a candidate for public office in being free from defamation, and the state's interest in ensuring accurate information during election campaigns. Majority op., ¶ 41. The majority then reaches the surprising conclusion that the order requiring Rongstad to disclose the membership of the Alliance, who would then be named as defendants in a highly publicized defamation suit, did not chill First Amendment rights. Majority op., ¶¶ 67-68. As a result, the majority concludes that it need not balance the competing interests to determine whether the circuit court's decision to compel disclosure was narrowly tailored. Majority op., ¶ 71. I cannot agree.

¶ 147 First, although I agree that affording candidates a means to relief from defamation and ensuring accurate information during election campaigns are legitimate state interests, I disagree that compelling Rongstad to disclose the membership of the Alliance advanced either interest. Second, I believe that compelling Rongstad to disclose the membership information, effectively guaranteeing that the unmasked individuals would become defendants in this lawsuit, substantially chilled First Amendment rights. Consequently, I conclude that the circuit court could not have concluded that the state interests outweighed Rongstad's assertion of privilege without first determining that Lassa's claim was capable of a defamatory meaning. Thus, I conclude the order compelling disclosure was not narrowly tailored and cannot support the imposition of sanctions.

A. No Compelling State Interest Justified Disclosure

¶ 148 Lassa's suit implicates two state interests, the interest of a candidate for public office in being free from defamation, and the state's interest in ensuring accurate information during election campaigns. Majority op., ¶ 41. At the time the circuit court ordered Rongstad to disclose the membership of the Alliance, neither interest was compelling.

1. The State Interest in Protecting Citizens Against Defamation

¶ 149 Two features of Lassa's claim dilute the strength of the state's interest in protecting citizens from defamation. First, during an election campaign the state's interest in preventing defamation is counterbalanced by its interest in promoting political discourse. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). A court's duty to protect speech involving a public figure is heightened during elections. *See Roy*, 401 U.S. at 272, 91 S.Ct. 621 (stating that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"). Courts must be solicitous of the reality that "[t]he clash of reputations is the staple of election campaigns," and that campaigning necessarily entails bruised reputations.

¶ 150 As the Supreme Court explained:

> It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast and the advantages derived are so great that they more than counterbalance the inconvenience of the private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.

Id. (quoting *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281, 286 (1908)). [40]

¶ 151 Second, Lassa's suit presents a defamation claim by a public figure against a media or non-media defendant, "*which will always involve a conditional constitutional privilege.*" *See* Wis JI-Civil 2500 at 9 (emphasis added).[41] The

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[40] The United States Supreme Court has expressed doubts as to "whether there [even] remains some exiguous area of defamation against which a candidate may have full recourse [during elections]." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). The Court in *Roy* noted that " '[i]f actionable defamation is possible in this field, one might suppose that the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits.' " *Id.* (quoting Noel, Defamation of Public Officers and Candidates, 49 Col. L.Rev. 875 (1949)).

Although the majority cites several cases involving claims of defamation made by candidates for public office, majority op. ¶ 41 n. 14, the majority fails to cite a single case where a candidate succeeded in prosecuting a defamation claim.

[41] A "Law Note" with this identical categorization has been part of the Wisconsin Civil Jury Instructions since 1984.

> The First Amendment imposes a constitutional privilege on the publication of statements about public figures, even when those statements are false and defamatory. The privilege, however, is conditional, and the condition is the absence of actual malice. The requirement that actual malice be proven is a minimal accommodation of the reputational interests of public figures and the community's interest in unfettered public debate.
>
> ....
>
> Proof of actual malice requires a showing that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for its truth.

Id. at 535-36, 563 N.W.2d 472.

central principles pertaining to public figure defamation were summarized by this court in *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis.2d 524, 563 N.W.2d 472 (1997):

¶ 152 To discourage the use of defamation claims as a tool to suppress political speech, candidates for public office must meet a high standard to prove defamation. It is not that we love public officials less, but that we love freedom of expression more, that we must hold *any* public official to a high standard in a defamation suit.

¶ 153 I doubt that if this court were to engage in a sentence-by-sentence analysis of the Rongstad mailing (or take it as a whole), it would conclude that the mailing was defamatory under the United States Constitution. It is obvious that the majority shares this view, for it assiduously avoids any definitive pronouncement on defamation and attempts to recast the issues so that any such pronouncement is unnecessary.

¶ 154 In my view, the Rongstad mailing was offensive and unfair but not defamatory in a constitutional sense. Lassa had every right to be angry and to take steps to address the criticism she received. On the other hand, she was a public official with access to the news media and ample time before the upcoming April elections to rally people to her defense. There is no discernible reason why the court should have forced Rongstad to answer *every* question related to the 2002 mailing before determining that Lassa's suit could survive a motion to dismiss.

2. The State Interest in Ensuring Accurate Information During Election Campaigns

¶ 155 The majority's claim that the state had a compelling interest to ensure accurate information during an election campaign proves equally unpersuasive in this case.

¶ 156 The nature of the *Rongstad* mailing undermines any claim that the state had an overriding interest in protecting the public from fraudulent and libelous speech. The fact is,

even without a court ruling, the mailing backfired. The mailing was so transparently cartoonish and political in nature that it did not hurt Lassa; it helped her.[42] As Bill Berry, a former editor of the Stevens Point Journal, put it, "An outsider doesn't trash a local farm girl up here and get away with it." *See* Bill Berry, *Point ounterpoint* (Aug. 28, 2003), http://www. FightingBob.com. Lassa's own complaint acknowledges that her voting percentage went up in the election immediately following distribution of the mailing, when its impact was fresh. Accordingly, it is difficult to accept the proposition that Rongstad's mailing misled anyone.

¶ 157 What's more, if the mailing did mislead anyone, Lassa had months to respond and set the record straight. *Cf. McIntyre*, 514 U.S. at 352 n. 16, 115 S.Ct. 1511. In *McIntyre* the Supreme Court distinguished between the need to prevent fraudulent and libelous speech that occurs in the "eleventh-hour" before an election and speech that occurs months in advance. *Id.* Whereas the former affords a candidate no time to respond, the latter gives a candidate adequate time to counter any falsehood. Immediate court action may be

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[42] As the United States Supreme Court noted in *McIntyre*:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.

McIntyre v. Ohio Elections Comm'n, 514 U.S. at 348 n. 11, 115 S.Ct. 1511 (internal quotation marks and citation omitted). In their rulings, the circuit court and the majority underestimate voters. In doing so, they do a disservice to us all by cheapening the concomitant rights to freedom of speech and freedom of association, and the right to privacy in those freedoms.

necessary to remedy an eleventh-hour attack, but it is less likely to be necessary when the election is several months away.

B. Disclosure Substantially Chills First Amendment Rights

¶ 158 The majority relies upon the test expounded upon in *NAACP*, decided in 1958, and *Buckley* to determine whether Rongstad made a factual showing that disclosure would chill First Amendment rights. Factually, however, the present case is very different from *NAACP, Buckley*, and any of the other cases the majority cites. Unlike the cases cited by the majority, this case concerns a public official's attempt to obtain confidential membership information in the course of a defamation claim *for the purpose of adding those anonymous members as defendants in the lawsuit*. This distinction matters because the amount of time and money required for private individuals to defend against a defamation claim should be recognized as sufficient to establish an objective, substantial chill upon First Amendment rights. *See Torgerson*, 210 Wis.2d at 538-39 n. 14, 563 N.W.2d 472 ("The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself") (quoting *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (C.A.D.C.1967)).

¶ 159 Since the Supreme Court decided *NAACP* and *Buckley*, legislatures, courts, and commentators have come to appreciate just how much lawsuits like this one chill First Amendment rights. Lassa's defamation suit against Rongstad fits within the classic prototype of a SLAPP suit (a Strategic Lawsuit Against Public Participation). Kathleen L. Daerr-Bannon, Cause of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss, 22 Causes of Action 2d 317, 323 (2003) (noting that libel and slander are among the most common claims alleged in SLAPP complaints). SLAPP suits "are fashioned as traditional

lawsuits for tortious misconduct but are in actuality thinly disguised efforts to abuse the litigation process in order to silence citizen discussions on issues affecting the public well-being." *Id.* at 322. "The purpose of the SLAPP ··· is distinctly not to succeed on the merits, but to so intimidate the private citizen (or even the government official) that citizen activity ceases because the expense, risk and anxiety engendered by the process of litigating a SLAPP is too great." *Id.; accord In re Discipline of Attorney*, 442 Mass. 660, 815 N.E.2d 1072, 1074 n. 2 (2004); *Dickens v. Provident Life & Accident Ins. Co.*, 117 Cal.App.4th 705, 713, 11 Cal.Rptr.3d 877, 882 (2004).

¶ 160 Since the State of Washington enacted the first statute imposing procedural hurdles upon SLAPP suits in 1989,[43] at least 19 states have enacted legislation to discourage SLAPP suits (anti-SLAPP statutes). *See* Daerr-Bannon, *supra*, at 341-43 (listing 19 states); California Anti-SLAPP Project, http://www.casp. net/menstate.html (last updated Feb. 6, 2006) (listing 24 states). In addition, as of February 2006 anti-SLAPP legislation was pending in 10 states. California Anti-SLAPP Project, http://www.casp. net/menstate.html (last updated Feb. 6, 2006).

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[43] *See* Wash. Rev.Code Ann. § 4.24.510 (West 2005) (Historical and Statutory Notes).

¶ 161 Until this case, the term SLAPP suit had been relatively unheard of in Wisconsin jurisprudence.[44] Mention of a SLAPP suit is made in only one Wisconsin case. *See Vultaggio v. Yasko*, 215 Wis.2d 326, 359, 572 N.W.2d 450 (1998) (Bradley, J., dissenting). In *Vultaggio* Justice Bradley recognized that "[r]egardless of whether such suits are legitimate grievances or SLAPP suits (Strategic Lawsuit Against Public Participation) the possibility of a multi-million dollar lawsuit may chill democratic participation ···." *Vultaggio*, 215 Wis.2d at 359, 572 N.W.2d 450 (Bradley, J., dissenting). I believe that the present suit substantially chills First Amendment rights of speech and association and that the majority seriously errs by refusing to balance the competing interests to determine whether the circuit court

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[44] While the term SLAPP suit is relatively new in Wisconsin jurisprudence, the core concept is not new. The third-party brief filed by Attorneys Friebert and O'Neill on behalf of Alex Paul opened with the observation:

> This case is a classic example of much ado about nothing. Plaintiff has attempted to manufacture a defamation claim out of a run-of-the-mill negative political ad accurately pointing out that one of her supporters has been charged with criminal conduct.
>
> Her complaint hinges on an allegation, unsupportable by the actual text of the mailer, that the mailer accuses her of criminal conduct. Based on this tenuous allegation, plaintiff aggressively pursued contentious discovery from defendant Todd Rongstad, for the express purpose of furthering her political goal of running for the State Senate.

Because the concept of a SLAPP suit-though not the term-was before the circuit court, identifying this case as a SLAPP suit does not alter the "constitutional calculus[.]" *See* Majority op., ¶ 73. Rather, the necessary legal principles were presented to the court by the parties, but the court erred in how it balanced the competing interests.

should have compelled Rongstad to disclose the membership of the Alliance. *Cf. Major v. Silna*, 134 Cal.App.4th 1485, 1490-91, 36 Cal.Rptr.3d 875, 878 (2005) (noting "the anti-SLAPP law has been applied to actions arising from political literature discussing the qualifications of candidates during elections.").

¶ 162 Use of discovery to obtain confidential information pertaining to the membership of the Alliance, and the majority's response, demonstrate the need for legislation to prevent parties from manipulating the legal system to chill the exercise of First Amendment rights. The legislature should consider the experience of other states that have enacted anti-SLAPP statutes and consider adopting legislation modeled upon the anti-SLAPP statutes in states like California, Cal.Civ.Proc.Code § 425.16 (West 2005), and Massachusetts, Mass. Gen. Laws Ann. ch. 231, § 59H (West 2005). The potential for the strategic abuse of legal process is real. As one court put it:

> SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense .... The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

Gordon v. Marrone, 155 Misc.2d 726, 590 N.Y.S.2d 649, 656 (N.Y.Sup.Ct.1992).

C. The Order Compelling Disclosure Was Not Narrowly Tailored

¶ 163 The circuit court's order to compel disclosure was not narrowly tailored. The court failed to examine with exacting scrutiny the legitimacy of the asserted state interests and dismissed as unsubstantiated Rongstad's assertion that disclosure would chill First Amendment rights. Based upon these errors, the circuit court ordered Rongstad to comply with its discovery order or pay $1000 per day in contempt. Without a *prior* determination that Rongstad's mailing was capable of a defamatory meaning and that the identity of Alliance members was necessary for Lassa's suit to proceed, I cannot accept that the circuit court's order was narrowly tailored to protect First Amendment rights.

¶ 164 It is difficult to understand how Lassa's interest in being free from defamation was furthered by compelling disclosure of the anonymous speakers at such an early date. Lassa had all the necessary ingredients to clear her name without requiring the disclosure of the Alliance membership. In *Doe v. Cahill*, 884 A.2d 451 (Del.2005), cited by the majority, the plaintiff did not know the identity of any of the defendants when discovery was sought; here Lassa knew the identity of the primary defendant. Therefore, because "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics[,]" *Cahill*, 884 A.2d at 457, the circuit court should have protected Rongstad and the anonymous speakers from any potential ulterior motive by considering

Rongstad's motion to dismiss before compelling discovery.[45] In deciding otherwise, the circuit court and the majority appear to have lost sight of the purpose of defamation litigation and the proper balance of the constitutional rights at stake in this case.

¶ 165 To succeed in a defamation claim against a public official, a plaintiff must prove actual malice, which might well require discovery. In this case, however, there are *preliminary* issues to resolve, such as whether the statements in the mailing were substantially true or simply not defamatory as a matter of law. The sine qua non of public figure defamation is the distribution of false words or statements that damage a person's reputation.

¶ 166 A motion to dismiss raises a threshold challenge to a lawsuit, which a court should adjudicate early on so that meritless suits can be disposed of without the expense and delay of discovery and additional litigation. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1349, at 56-57 (3d ed. 2004). Generally, the standard a complaint must meet to survive a motion to dismiss is toothless. A complaint for defamation, however, must meet

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[45] The fact that Lassa agreed to dismiss her defamation claim with prejudice as part of the settlement agreement supports an inference that Lassa was more interested in unmasking her anonymous critics than she was in being free from defamation.

In its brief to the court of appeals as amicus curiae, the American Civil Liberties Union of Wisconsin Foundation referred to Lassa's lawsuit as a SLAPP action, i.e., a "Strategic Lawsuit Against Public Participation." It notes,

Because SLAPP actions are so dangerous to free speech, it is crucial to the continued protection of First Amendment freedoms of speech that courts recognize and dismiss these suits in a timely manner, upon proof of failure to state a claim upon which relief may be granted, before compelling answers to discovery questions that require disclosure of potentially constitutionally protected political associations.

a higher standard. Not only must a court decide as a matter of law that the content complained of can support a defamatory meaning, but "the particular words complained of" must be set forth in the complaint. Wis. Stat. § 802.03(6).

¶ 167 Lassa's complaint made assertions of false statements that are simply not contained in the disputed mailing. The "particular words complained of" were either not identified or consisted of the entire paragraph beginning with the sentence fragment: "Extortion, misconduct in public office, pay to play, lying, cheating and stealing." Yet, this paragraph does not contain an assertion that Lassa herself committed any act in the list.

¶ 168 The majority acknowledges that a "defamation plaintiff should not be able to employ the rules of discovery to obtain the identity of an anonymous political speaker simply by filing a complaint that is facially unsustainable." Majority op., ¶ 42. The majority reasons that "the use of discovery to uncover the speaker's identity may chill the exercise of the right to free speech." *Id.* In support of this position, the blue chip amici in this case joined the defendants in urging us to require courts to "decide whether a defamation complaint states a claim on which relief may be granted *before* imposing sanctions for the refusal to disclose information based on the type of constitutional privilege Rongstad has asserted." *Id.*, ¶ 44 (emphasis added). The majority agrees, determining that:

> [U]nder Wisconsin law, requiring the circuit court to decide a motion to dismiss before compelling disclosure and imposing sanctions best addresses the concerns expressed .... When faced with an assertion of constitutional privilege against disclosure of information identifying otherwise-anonymous organization members, the circuit court should decide a pending motion to dismiss for failure to state a claim before sanctioning the party for refusing to disclose that information.

Id., ¶ 52.

¶ 169 Unfortunately, the majority fails to apply this rule in the present case even though the defendants requested repeatedly that the circuit court act first on the motion to dismiss. In their January 27 Brief in Support of Motion for Protective Order, the defendants objected to the plaintiff's effort to "unreasonably expedite the discovery process···· Plaintiff's counsel has offered no explanation as to why discovery must begin immediately." Defendants asked for a postponement of the deposition until they had the opportunity to answer the complaint and file a *motion to dismiss.* "[F]orcing Defendant Rongstad to undergo a deposition prior to a *resolution of these preliminary matters* subjects him to annoyance, oppression, undue burden and expense." (Emphasis added.) The next day, Attorney Crooks requested an adjournment of any depositions until after the court heard the motion to dismiss.

¶ 170 Defendants answered the complaint on February 10 and filed a motion to dismiss on February 11. The court could have asked for earlier filings from the defendants in lieu of expedited discovery. Instead, the defense was tied up for hours and hours of depositions and hearings before it had an opportunity to file and brief the motion to dismiss. At almost the same time, the court relieved the plaintiff of the burden of submitting to a deposition that might have been useful to the defense in establishing the truth of certain controversial statements in the mailing. Notably, the court issued a protective order for the defamation plaintiff but denied the same for the defamation defendants.

¶ 171 As the majority concedes, the defense was still attempting to get a decision on its motion to dismiss in late April. Majority op., ¶ 56. Nonetheless, the court made no decision on the motion to dismiss until July 8, long after sanctions had been imposed, and 147 days after the motion to dismiss had been filed.

¶ 172 The majority minimizes the defendants' efforts to obtain a ruling on the motion to dismiss before the court imposed sanctions. We are told that few appellate courts have been asked to determine whether such a procedure should be followed. *Id.*, ¶ 46.

In short, Rongstad did not raise his argument that the circuit court was required to address his motion to dismiss before it compelled discovery until after the court imposed discovery sanctions. Moreover, the argument that the constitutional dimension of the parties' discovery dispute mandated this course of action was a relatively novel one considering existing law at the time. *Id.*, ¶ 58.

Poppycock.

¶ 173 Contrary to the majority's statements, the argument that courts should consider motions to dismiss or motions for summary judgment before compelling discovery in libel suits is not that novel. The "Defamation Law Note for Trial Judges" has contained the following language since 1984:

The *initial inquiry* in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is *normally presented on a motion to dismiss*. On a motion to dismiss, it is the function of the Court to determine whether a communication is capable of a defamatory meaning.

Wis JI-Civil 2500 at 3 (emphasis added). This precise language was cited to the court in Attorney Crooks's February 11 brief, at the beginning of the section titled "ANALYSIS." Counsel went on to state: "The Wisconsin Supreme Court has been clear in advocating the use of summary judgment and motions to dismiss in cases involving defamation." The brief cited and quoted *Torgerson*, in which the court said:

Since *New York Times [Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)] summary judgment has played a key role in protecting First Amendment values. Indeed, it

has been said that in public figure defamation cases, "because of the importance of free speech, summary judgment is the 'rule,' and not the exception." [citation omitted] The Wisconsin court of appeals has said that "[s]ummary judgment may be particularly appropriate in defamation actions in order to mitigate the potential 'chilling effect' on free speech and the press that might result from lengthy and expensive litigation."

Torgerson, 210 Wis.2d at 538, 563 N.W.2d 472. *See also Mach v. Allison*, 2003 WI App 11, 259 Wis.2d 686, 656 N.W.2d 766 (a Dane County case); *Maguire v. Journal Sentinel*, Inc., 232 Wis.2d 236, 605 N.W.2d 881 (Ct.App.1999).

¶ 174 Furthermore, in 1977, the court in *Hutchinson v. Proxmire*, 431 F.Supp. 1311, 1329 (W.D.Wis.1977) (reversed on other grounds), recognized that courts must consider dispositive motions, such as summary judgment, as soon as it becomes clear that a plaintiff cannot succeed with her defamation claim. The court noted that "the court has a special responsibility ··· to determine if there is any genuine dispute *because of the danger that speech may be chilled by the mere fact of litigation*." *Id.* (emphasis added). It follows that courts have a special responsibility to consider motions to dismiss as soon as possible to determine whether the speech is even capable of a defamatory meaning. While proof of actual malice may require additional discovery, proof that a mailing is capable of a defamatory meaning requires at most minimal discovery, and certainly not the unmasking of anonymous speakers.

¶ 175 In *Herbert v. Lando*, a seminal case on public figure defamation, the United States Supreme Court upheld a defamation plaintiff's demands for civil discovery, but the case involved the search for "actual malice," *assuming* the existence of "damaging falsehoods." Justice Powell, in concurrence, remarked that a district court, in supervising discovery in a libel suit by a public figure, "has a duty to consider First Amendment interests as well as the private

interests of the plaintiff." *Id.* at 178, 99 S.Ct. 1635. "In some instances, it might be appropriate for [the court] to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for the material demanded." *Id.* at 180, 99 S.Ct. 1635. Justice Brennan and Justice Marshall made even stronger comments in dissent.

¶ 176 These sentiments are echoed in *Sack on Defamation*. "A plaintiff should be required to satisfy the court that the claims at issue are not frivolous before infringing on constitutionally based interests." Robert D. Sack, *Libel, Slander, and Related Problems* § 12.3.2.2 (2d ed. 1994) (citing a host of cases).

¶ 177 In light of the pervasive authority to the contrary, it is hard to accept the majority's conclusion that Rongstad's argument was so novel that the circuit court did not have to address Rongstad's motion to dismiss before compelling discovery or imposing discovery sanctions. Majority op., ¶ 58.

¶ 178 Even if the mailing were capable of a defamatory meaning, however, the court should still have afforded Rongstad a timely ruling on his motion to dismiss. While Lassa had an interest under the *McIntyre* exacting-scrutiny analysis in being free from defamation, Rongstad had a legitimate First Amendment interest in protecting anonymous political speech. *See McIntyre*, 514 U.S. at 357, 115 S.Ct. 1511. Because "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and ··· dissent[,]" the court order compelling disclosure before a ruling on defamatory meaning infringed upon First Amendment rights. *Id.* When the court refused to timely decide the motion to dismiss, it effectively deprived Rongstad of the opportunity to defend himself and the First Amendment rights of the Alliance membership. It effectively

denied him due process of law.[46]

¶ 179 By losing sight of the proper balance of interests and not applying exacting scrutiny, the majority inappropriately justifies the award of sanctions and compulsion of discovery. The majority justifies this decision by asserting that Rongstad's counsel did not properly raise the issues before the court and, therefore, did not assert his constitutional rights. Try as it may, the majority cannot change the context in which Rongstad's counsel presented the issues to the court. The record is clear that counsel for the defense timely advised the circuit court of law and procedure to allow it to respect and conform to First Amendment principles. The court demonstrated such disdain for the defendants, however, that it disregarded these principles.

¶ 180 The right to anonymous speech would mean nothing if courts could require the exposure of an anonymous

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[46] *See Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) ("Due process requires that there be an opportunity to present every available defense") (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 77 L.Ed. 231 (1932)); *cf. Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard ···· In the present context these principles require ··· timely and adequate notice, and an effective opportunity to defend by confronting any adverse witnesses and by presenting ··· arguments and evidence orally.") (internal citations and punctuation omitted); *William B. Tanner Co. v. Estate of Fessler*, 100 Wis.2d 437, 446, 302 N.W.2d 414 (1981) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

speaker who did not issue a defamatory statement. At a minimum, the circuit court should have determined whether Rongstad's mailing was capable of a defamatory meaning *before* ordering discovery and imposing sanctions.

¶ 181 Finally, even if I were wrong in how I balance the interests involved, I cannot understand how the majority can refuse to give Rongstad the benefit of the rule it adopts. *Contra Jacque v. Steenberg Homes, Inc.*, 209 Wis.2d 605, 625, 563 N.W.2d 154 (1997). In *Jacque* this court stated that a court should apply a new rule retroactively when refusing to do so would deprive the party who prompted the change of any benefit from its efforts and expense in successfully fighting to change an old rule. *Jacque*, 209 Wis.2d at 625-26, 563 N.W.2d 154. The majority does Rongstad a grave injustice by denying him the benefits of his efforts.

III. CONCLUSION

¶ 182 In this case, no court has ever ruled that the 2002 mailing was defamatory. A circuit court judge (Maryann Sumi, Judge) ruled that the mailing was *capable* of defamatory meaning but only after contempt sanctions had been imposed. This procedure denied defendant Rongstad an authoritative judicial ruling on his motion to dismiss before the court required him to submit to total discovery. If the court had made a prompt ruling that the mailing was capable of defamatory meaning, Rongstad might have yielded to the court's order. In any event, the court's ruling would have gone a long way toward protecting Lassa's name before the senate election. The court's unwillingness to make a timely ruling on the motion to dismiss permitted the opposite inference.

¶ 183 In the absence of such a ruling, it is draconian to subject Rongstad to the heavy, heavy financial sanctions at issue in this case. We cannot remedy the procedural wrong that trivialized the defendants' constitutional right to

anonymously exercise their right to speak and associate freely. We can and we should, however, nullify the penalty imposed upon the defendants for attempting to assert First Amendment rights.

¶ 184 From the beginning, the circuit court treated this case as though the plaintiff were helplessly chained to a railroad track with a speeding train just around the bend. The facts never supported such urgency. Senator Lassa is a shrewd and savvy legislator with a good reputation and durable popularity. She waited more than two months after she won 73 percent of the vote before she filed suit because she did not have to rescue her good name. She did not file suit in her home county to protect her reputation among her voters. She filed suit in Dane County, where her reputation was never at risk.

¶ 185 The majority sees nothing amiss in socking the defendant $65,000 for advocating the very First Amendment principles that this court approves. This case will prove without doubt to be a significant libel case, not necessarily for the law it has promulgated, but for the fact that a public figure defamation plaintiff got everything she wanted without ever proving defamation.

¶ 186 Because I fear the majority decision chills freedom of expression not only for members of the Alliance, but for all Wisconsin citizens, I respectfully dissent.

APPENDIX B

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Branch 13

JULIE M. LASSA,

Plaintiff,

v.

TODD RONGSTAD,

THE VALKYRIE GROUP, LLC,

A.M. MAILING SERVICES, INC.,

and

Does, 1-5, in their individual capacities,

Defendants.

RULING ON OBJECTION TO DEPOSITION QUESTIONS

Case No. 03-CV-177
Case Code: 30106

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 4th day of February, 2003, commencing at 9:30 o'clock a.m.

PRESIDING: HONORABLE MICHAEL N. NOWAKOWSKI

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared telephonically on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared telephonically on behalf of the defendants' Todd Rongstad, The Valkyrie Group and Does 1-5;

ERIC M. McLEOD, Michael Best & Friedrich, LLP, Attorneys at Law, One South Pinckney Street, Madison, Wisconsin, appeared telephonically on behalf of the defendant A. M. Mailing Service, Inc.

Laura Stuessy, RMR, CRR
Official Court Reporter

particular situation is a fairly complex issue.

THE COURT: Well, certainly I started out our conversation yesterday with exactly that lack of information that you allude to. I don't want to pretend to have been made privy to all of what was testified to by Mr. Rongstad during the preceding three or four hours, but certainly, let us say I was further educated. I don't pretend now to hold a master's degree on the topic, but I did get further instruction and elucidation.

As a result, at this point I'm prepared to go ahead and rule on these objections or the objection that was made, and I think I understand the positions that both of the attorneys were making. And certainly the cases which were cited, and I'll recite them in a moment, were ones that I had a chance last evening to review, and I understand the relevance of the case law to the arguments that primarily Mr. Crooks was making last evening.

MR. GARVEY: Your Honor, this is Ed Garvey. May I just ask the Court if your court reporter is taking this down, or should we have our reporter in here?

THE COURT: No. I have my court reporter now, which of course I would always prefer rather

than relying on whatever may be happening on the other end of a telephone with somebody else who's not an official reporter, and I say that with the greatest respect for the qualifications of the free-lance reporters.

Now, the defendant Rongstad contends that he has the right to refuse to disclose the names of members of his organization that were directly involved in the publication of the allegedly defamatory mailing concerning the plaintiff on the basis of his and their rights to free speech and to free association under the First and Fourteenth Amendment.

Let me at this point interject to respond to the further objection or the further ground for objection that Mr. Crooks has lodged on today's date, namely that an inquiry concerning the names of other members of the organization would be irrelevant and would not lead to the discovery of relevant information. That I think can summarily be disposed of by pointing out that Mr. Garvey and his client are not required to accept at face value the testimony of Mr. Rongstad that these other people really were not the principals, they were not the primary movers behind this, that he was in fact the principal participant and that the entire mailing was of his making and at

his instigation.

Instead, Mr. Garvey is free to pursue further discovery, and perhaps it will lead, if he knows who the people are, to the conclusion that they are people who have liability and that he can, consistent with his obligations under section 802.05, join them in an action where it would be necessary for him to make an allegation of express malice and intent to harm given the admitted status of the plaintiff as a public figure. Therefore, the objection grounded on relevance will be overruled.

Now, in support of Mr. Rongstad's objection based on constitutional grounds, his counsel cited several cases, NAACP v Alabama, Buckley v Valeo, McIntyre v Ohio Elections Commission, Wisconsin Socialist Workers 1976 Campaign Committee v McCann, (phonetic) and Elections Board v WMC.

As I indicated, at Mr. Crooks' invitation I've now had a chance to review each of these cases. At the outset, it's important to recall the context in which this issue arises. This is a private lawsuit in which an individual citizen seeks injunctive relief and damages on the basis of her allegations that she has been defamed by the named defendants, including the defendant Rongstad and other unknown

individuals. The suit asserts common law rights and is not based on any regulation or statute. It is, thus, different than each of the cases noted earlier where it was direct governmental regulation that was at issue.

I point out this distinction not because it is determinative, for First Amendment rights are still implicated where the judicial power of the state is sought to be used to compel disclosure, but because the interests to be weighed are different in this setting than in the pure government enforcement arena.

The Supreme Court's decision in NAACP v Alabama provides the framework of analysis. There the court stated, and I quote -- and this is at 357 U.S. 463, "We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association."

In Buckley v Valeo, the court made it clear at page 69 and following of 424 U.S. that a person claiming that disclosure of information would violate

their associational rights must make a "requisite factual showing" before the strict scrutiny of NAACP v Alabama would prevent that disclosure.

The court went on to describe the necessary showing at page 74, and it said, "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either government officials or private parties."

Here Mr. Rongstad and his counsel have failed to present any assertion, much less any evidence, that disclosure of the names of those involved in the publication of the allegedly libelous mailing would subject him to or these other individuals to threats, harassment or reprisals from anyone. The cases cited by the defendant do not grant to membership information a sacred constitutional status of absolute immunity and privilege simply on the basis that it can be categorized as such. Such a reading of NAACP v Alabama trivializes the interests of the members found compelling there and of the constitution itself.

Even if were I to conclude that disclosure here would have some impact on the associational interests

of defendant Rongstad and the other members of his organization, the competing interests of the plaintiff and public interests at stake are more than sufficient to outweigh them.

The purely private interest of any citizen in his or her good name has long been recognized as worthy of the careful protection of the law. While the plaintiff by voluntarily injecting herself into the public spotlight by becoming a candidate for public office is expected to live with certain attacks on her good name that a purely private person might not have to suffer, she does not forfeit entirely the law's protection.

Moreover, there is a public interest at stake here that has been identified as particularly worthy of concern. In McIntyre v Ohio Elections Commission, 514 U.S. at 349, the Supreme Court noted, "The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements if credited may have serious adverse consequences for the public at large."

The court went on at page 352 to note that this interest is heightened when the allegedly libelous

publication is disseminated "on the eve of an election when the opportunity for reply is limited". The Complaint in this case alleges that the mailing at issue was distributed to voters in the plaintiff's district only days prior to the election.

Finally, the plaintiff's need for disclosure of the names of those involved is particularly strong here because these are people who may have directly participated in causing her alleged harm and there is no other source for the information.

As the Court's discussion of the law at issue in McIntyre reveals, disclosure of identifying information is more likely to be constitutionally permissible where no less intrusive step will accomplish the government's legitimate interests. Defendant Rongstad has failed to identify what less intrusive measure is available to the plaintiff to seek redress under the law.

As the Supreme Court aptly noted in NAACP v Alabama, 357 U.S. 463, "It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation and no right to disregard Alabama's laws."

Were I to sustain the objection to the questions at issue here on the record before me, the practical

effect would be to grant these unknown participants in the alleged defamation of the plaintiff the absolute immunity that the Supreme Court was so careful to eschew.

The objections are overruled, and the defendant Rongstad is ordered to answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing.

MR. CROOKS: Your Honor? Pursuant to Wis. Statute section 808.07(2)(a), we'd request a stay of your Honor's order until we have an opportunity to seek a supervisory writ from the Court of Appeals.

MR. GARVEY: Your Honor, this is Ed Garvey. We would certainly oppose that and also ask for costs and fees in connection with this matter.

The Court has clearly pointed out our need for this information to determine who Does 1 through 5 are, and we see absolutely nothing to be served by staying this matter, which would just continue what has been going on in this matter, which is an effort by Mr. Crooks to delay this matter beyond the time that it would be of help to the plaintiff.

MR. CROOKS: Your Honor, there is no attempt to delay. There's attempt to deal with the

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT

TODD RONGSTAD,
as president of Valkyerie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597

The Valkyrie Group, LLC,
108 W. 3rd St.
Waunakee, WI 53597

A.M. Mailing Services, Inc.,
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

Does, 1-5, in their individual capacities,

Defendants.

ORDER DENYING DEFENDANT'S OBJECTION TO DEPOSITION QUESTIONING REGARDING ALLIANCE MEMBERSHIP

IT IS HEREBY ORDERED: that Defendant's objections to plaintiff's questions as to the identity of persons

and their conduct regarding the production of the mailing at issue in this case on the grounds of relevance, freedom of speech and freedom of association is hereby denied.

IT IS HEREBY ORDERED: that the defendant, Todd Rongstad, answer all questions pertaining to the identity of the persons involved in the preparation, funding or distribution of the postcard at issue and pertaining to their conduct in this regard.

BY THE COURT

/s/

The Honorable Michael Nowakowski
Circuit Court, Branch 13

APPENDIX D

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,
Plaintiff,

vs.

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC.,
and
Does, 1-5, in their individual capacities,
Defendants.

MOTION FOR RECONSIDERATION
Case No. 03-CV-177
Case Code: 30106

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 6th day of February, 2003, commencing at 10:05 o'clock a.m.

PRESIDING: HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants Todd Rongstad, The Valkyrie Group and Does 1-5;

Laura Stuessy, RMR, CRR
Official Court Reporter

And to indicate that he has not answered the questions and that he has continued to flaunt the Court's order is not accurate. He answered all questions with respect to the postcard as your Honor ordered and as your Honor will see in the transcript at issue.

What we're here about and the constitutional issue before the Court is whether he has to disclose the membership of the Alliance whether it had anything to do with this postcard or not and that is not what your Honor ruled. Your Honor ruled that he had to disclose individuals and members who had something to do with the postcard at issue. He has done that. The membership list in general is clearly protected by the First and Fourteenth Amendment, and that's why we're here.

THE COURT: Okay. Here's what's going to be determined today. The motion for reconsideration was provided to us yesterday, and I did have a chance to review the copies of the cases, and I appreciate Mr. Crook's attaching copies of the new authority that he was citing.

The response to that was received this morning. And again as to that, I had a chance to read the briefs, and I have not because of the short duration

of time available had the chance to read all of the attachments and follow up with any of the cases that those cases may have cited, but I think I am sufficiently clear on the positions that are taken by both counsel to at this time deny this motion, and I will deny it.

Now, in Mr. Rongstad's brief and again on today's date, I think he as a preliminary matter simply misconstrues the basis for the decision that I originally made. The suggestion that somehow the key to coming to a different result was to find cases where the issues under the First and Fourteenth Amendment of the constitutional right to associate had arisen in a private action, and that that would ultimately be the missing piece, so to speak, ignores what I had to say when I made the decision. And now hearing it again, I looked up in the transcript to be sure that I had in fact said it as I recalled saying it.

Indeed, the cases which Mr. Crooks cited to me was a limited number of cases, and under the circumstances Mr. Crooks did not ask, nor did I indicate that I was going to do an exhaustive search for every conceivable case. Instead, I was going to, as I promised, look at the ones that he had cited,

and I did. I noted that each of the cases that he had cited involved a situation of direct governmental regulation, direct governmental action taken against somebody, and it was in that context that the cases ultimately were decided.

But I then said, "I point out," and now I quote from page nine of the transcript, "I point out this distinction not because it is determinative for First Amendment rights are still implicated where the judicial power of the state is sought to be used to compel disclosure but because the interests to be weighed are different in this setting than in the pure governmental enforcement arena."

So I think, frankly, the suggestion that finding a case where in a private litigation setting First Amendment rights were upheld is not the point, and that is not a key and that is not determinative any more than the distinction that I pointed out.

Instead, one again has to look at the framework of analysis, and no one has suggested to me, and this motion for reconsideration does not suggest to me, that the framework provided by NAACP v Alabama as it has been clarified in later cases is not the correct framework. I continue to believe it is, and as a result I have attempted to apply it as I applied it

previously.

The second main thrust of this motion for reconsideration is that now, unlike the argument that had previously been made, Mr. Rongstad is presenting evidence to support the notion that the requisite factual showing has been made to implicate these First Amendment concerns, and I now have an affidavit of Mr. Rongstad.

What appears to be the singular representation that pertains to the harm that would befall members of the organization were Mr. Rongstad to disclose their identity is found in paragraph four. It says, "That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in participating in the organization or any such organization" -- and here's the key language -- "for fear of public reprisal and potential legal action." For fear of public reprisal.

Now, Buckley v Valeo said that the standard of proof, the quantum of proof that needed to be presented to make out the case that there should be confidentiality associated with the membership information of a minor party or minority party or a small organization, that the bar ought to be set

pretty low, and I follow that. I followed it in the original decision. There the bar really didn't have to be set anywhere because there was nothing that was presented.

But here, even with the generous standard of Buckley v Valeo, a simple conclusory statement that somebody told Mr. Rongstad that they had fear of public reprisal were their name to be revealed is wholly insufficient. The description in Buckley of what that low standard of proof might consist of was certainly not intended by the Supreme Court to be comprehensive of everything that could be presented or that it was necessary to have those precise kinds of statements or evidence on those precise points, but it is suggestive that something more than simply a bald-face conclusory statement that "I am fearful," or that "Somebody said to me that they would be fearful of public reprisal" was necessary.

The obvious question is why? What is it about this group that membership in this group would lead anyone to engage in public reprisals against their members?

Why would simply the fact of associating with this group be anything that would lead to threats, or harassment, or public reprisals or the kinds of

things that had been demonstrated in NAACP v Alabama to form the basis for the court's quite appropriate recognition that that was the kind of thing that people ought not to be subjected to because of their association with an organization or with beliefs of certain types?

Now, here fear of a lawsuit is on a very low standing. Indeed, I think there's probably legitimate fear on the part of the others involved in the funding and preparation and distribution of this postcard that they will become enmeshed in this lawsuit. Mr. Garvey's pleading on behalf of his client lists other John Does or other Does as the fictitiously named defendants. One ordinarily does not plead a case naming fictitious defendants without the intent to later upon discovery of who they may be to join them in the lawsuit.

But the First Amendment is not at its core designed to provide protection for someone's fear of -- better stated, it is not designed to provide immunity for someone's criminal or civil liability for their behavior. It may on occasion have the result of making it difficult to prosecute civilly or criminally someone, but that is not at its core the purpose for the protections afforded by the First and

Fourteenth Amendments.

As a result, these conclusory allegations and the references to fear of a lawsuit are simply so low that they do not satisfy the Buckley requisite factual showing. And if they do, they do so by simply skimming by and being barely sufficient.

And even once some showing is made, the balancing test is still necessary, and nothing that has been presented on this motion for reconsideration changes the conclusions that I reached when I made the decision back on February 4, and there's no reason to repeat those points at this time.

Now, on today's date Mr. Crooks makes an additional contention, and that is that he apparently now no longer is as concerned about the Court's order because he says his client has complied with it. And apparently if his client has fully complied with it, then we must be engaged in much ado about nothing by continuing to argue about whether there should be a court order that requires him to answer questions.

From the information that has been presented in the motion for reconsideration and the response to that motion about what happened and what answers had been provided by Mr. Rongstad thus far, it appears to me that Mr. Crooks has provided the very point that

justifies further inquiry of Mr. Rongstad, and that is that the organization of which Mr. Rongstad is apparently the CEO has a board of directors, and the board of directors makes decisions about what projects to fund. Mr. Garvey is entitled to find out, and Mr. Rongstad shall answer, as to who are the board of directors and who were the people who are the board of directors.

MR. CROOKS: Judge, he has answered those questions already.

MR. GARVEY: We do know two other board of directors who -- the two members who reside in Minnesota. There are three listed in the DFI documents.

THE COURT: And so, what more are you asking for then?

MR. GARVEY: Well, for example, your Honor, we took Mr. Rongstad's affidavit and asked him to disclose the identity of the members who approached him. He refused on grounds of First and Fourteenth. We asked him who the members are who have contributed the funds for this, and he says again it's the First and Fourteenth. And so, we reminded him of your Honor's order, and he will not answer any question about any person who hired him, suggested to him that

APPENDIX E

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,

Plaintiff,

-vs-

CONTEMPT HEARING
Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC, and
Does, 1-5, In Their Individual Capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING: HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:
The Plaintiff appeared in person, and by counsel EDWARD R. GARVEY and CHRISTA O. WESTERBERG, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;
MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:
ATTORNEY DAVID J. PLINER, Corneille Law Group, LLC

Laura Stuessy, RMR, CRR
Official Court Reporter

different position that he could not hold at the same time as he is a State Senator.

The planners of the postcard, if they in fact had the intent that Mr. Garvey has ascribed to them of undercutting Miss Lassa's efforts to seek to replace Senator Shibilski, wouldn't have known that there was a need to replace Senator Shibilski until he lost in the – well, I take that back. If he had won in the primary, he likewise would have faced the prospect of losing his seat if he became Lieutenant Governor, so I guess this does go to an earlier date.

All right. Here's then what we're going to do. To make this absolutely clear and avoid any confusion on Mr. Rongstad's part, Mr. Rongstad is ordered, at a deposition to be conducted on Monday morning, to provide the records and to disclose the names of any person who contributed any amount in excess of, say $100 or more in the aggregate during the six months preceding November 1st, so let us say at any time after May 1st of 2002.

Now, I will limit this to $100 or more because, frankly, it is hard to imagine how anything less than that would qualify as the necessary degree of personal involvement and intentional conduct to get past the defamation standard under Sullivan. And I

never get anything back. So if we're talking about the members and the contributions, wherever those records exist under his control, I would hope that it would be clear to Mr. Crooks that that information should be produced.

THE COURT: That's certainly my intent. I don't know if there's any way I can express this more adamantly that I am looking for Mr. Rongstad to comply with my prior court order. In this now I'm granting him the benefit of narrowing this court order, but the expectation is that he will in fact comply.

MR. GARVEY: One other item, if I may, your Honor. I understand the Court's reasoning, and I'm not arguing, but I want to say that Mr., or Senator Shibilski was running for Lieutenant Governor in the democratic convention which I attended in June of 2001. And so, it's been no secret that he was running with now Governor Doyle from that point forward, so that those who were looking at this matter would have been projecting ahead in terms of the control of the Senate, which your Honor can take judicial notice had been pretty close in terms of the majority between the democrats and republicans.

And so, while I appreciate the narrowing and the

APPENDIX F

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Julie M. Lassa,
Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT

Todd Rongstad,
The Valkyrie Group, LLC,
and
Does 1-5, in their individual capacities,
Defendants.

Filed Apr 4, 2003

ORDER

On March 11, 2003, the Honorable Michael Nowakowski, Chief Circuit Judge, heard argument on 1) Plaintiff Julie M. Lassa's March 3, 2003 Motion for Sanctions for Failure to Comply with Court-Ordered Discovery; 2) Plaintiff's March 10, 2003 Motion to Stay Defendant's Discovery; and 3) Defendant's motion for a stay pending appeal. Attorneys Michael Crooks and Anthony Conlin of Peterson, Johnson & Murray S.C. appeared on behalf of Defendants and Attorneys Edward Garvey, Glenn Stoddard and Pamela McGillivray of Garvey & Stoddard, S.C. appeared on behalf of Plaintiff.

The Court granted Plaintiff's motion to impose sanctions on Defendant Rongstad and her motion to stay Defendant's discovery and denied Defendants' motion for a stay pending appeal for the reasons set forth in the transcript of the motion hearing on March 11, 2003 attached hereto.

IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions for Failure to Comply With Court-Ordered Discovery is GRANTED, and it is further ordered as follows:

1) Defendant Rongstad shall pay all actual and reasonable attorneys fees of Plaintiff that have been incurred in the conduct of the depositions of Rongstad to date, plus all of the enforcement proceedings, including but not limited to the March 11, 2003 motion hearing, plus the various hearings that have been conducted previously, but excluding attorneys fees related to the motion to intervene regarding coverage under Rongstad's homeowner's insurance policy, in the amount of $32,587.00*, supported by the attached affidavit of counsel for Plaintiff.

2) Defendant Rongstad shall pay a forfeiture in the amount of $1,000 per day beginning March 13, 2003, and every day thereafter until Rongstad has made himself available for further deposition and has fully complied with the requirements to provide the information as ordered by the Court in its discovery orders.

3) If by April 4, 2003, Rongstad fails to comply with the Court's discovery orders, the Court will entertain a motion for judgment on all issues of liability in favor of the plaintiff and against all original named defendants as a further sanction for the Defendant Rongstad's failure to provide discovery. /s/ MN

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Defendants' Discovery is GRANTED, and it is further ordered as follows:

1) That subpoenas issued to the twelve non-party witnesses identified by Exhibit A of Plaintiff's Motion to Stay Defendants' Discovery are quashed.

2) Defendants shall not conduct discovery until Rongstad has made himself available for further deposition and has fully complied with the requirements to provide the information as ordered by the Court in its discovery orders.

IT IS FURTHER ORDERED that Defendant's Motion for Stay pending appeal is DENIED.

Dated this 2nd day of April, 2003.

By the Court:

/s/

The Hon. Michael Nowakowski
Dane County Circuit Court
Chief Judge

*The itemized statement of plaintiff's counsel in his affidavit of 3/12/03 and the objection letter of defendants' counsel dated 3/19/03 have been reviewed in the context of the court's awareness of the nature of the submissions made and proceedings conducted. No response from plaintiff's counsel to the letter of 3/19/03 was received. The amount awarded is a reflection of the adjustments noted directly on the affidavit of 3/12/03. /s/ MN

APPENDIX G

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 DANE COUNTY

Julie M. Lassa,
Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106
INTENTIONAL TORT

Todd Rongstad,
The Valkyrie Group, LLC,

and

Does, 1-5, in their individual capacities,
Defendants,

v.

Alex Paul,
Third-Party Defendant.

Filed Sep 15, 2003

ORDER

On August 15, 2003, the Honorable Maryann Sumi, Circuit Judge, heard argument on Defendants' Motion for Relief from Sanctions and Discovery Stay and Plaintiff's Motion for a Judgment on All Issues of Liability in Favor of Plaintiff and Against Defendants Todd Rongstad and The Valkyrie Group, LLC. Michael Crooks of Peterson, Johnson & Murray, S.C., appeared on behalf of Defendants, Matthew O'Neill of Freibert, Finerty & St. John, S.C., appeared on behalf of Third-Party Defendant, and Edward Garvey, Glenn Stoddard, and Pamela McGillivray of Garvey & Stoddard, S.C., appeared on behalf of Plaintiff.

The Court denied Defendants' motion for relief and granted Plaintiff's motion for default judgment for the reasons set forth in the transcript of the motion hearing on August 15, 2003 attached hereto.

IT IS HEREBY ORDERED that Defendants' Motion for Relief from Sanctions and Discovery Stay is DENIED and Plaintiff's Motion for a Judgment on All Issues of Liability in Favor of Plaintiff and Against Defendants Todd Rongstad and The Valkyrie Group, LLC is GRANTED.

It is further ordered as follows:

1. A scheduling conference has been set for September 2, 2003 at 3:30 p.m. in Branch 2, Dane County Courthouse.

2. Parties may submit a letter to the Court regarding proposed issues for the pretrial conference, including the role of the third-party defendant and whether a jury trial on damages is appropriate, by 4:30 p.m. on August 28, 2003.

3. All discovery is stayed until the pretrial conference.

4. Pending issues regarding the amount of monetary sanctions due shall be held is abeyance until the pretrial conference.

Dated this 15th day of September, 2003.

BY THE COURT:

/s/_____
The Hon. Maryann Sumi
Dane County Circuit Court Judge

APPENDIX H

OFFICE OF THE CLERK

SUPREME COURT OF WISCONSIN

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

October 3, 2006

You are hereby notified that the Court has entered the following order:

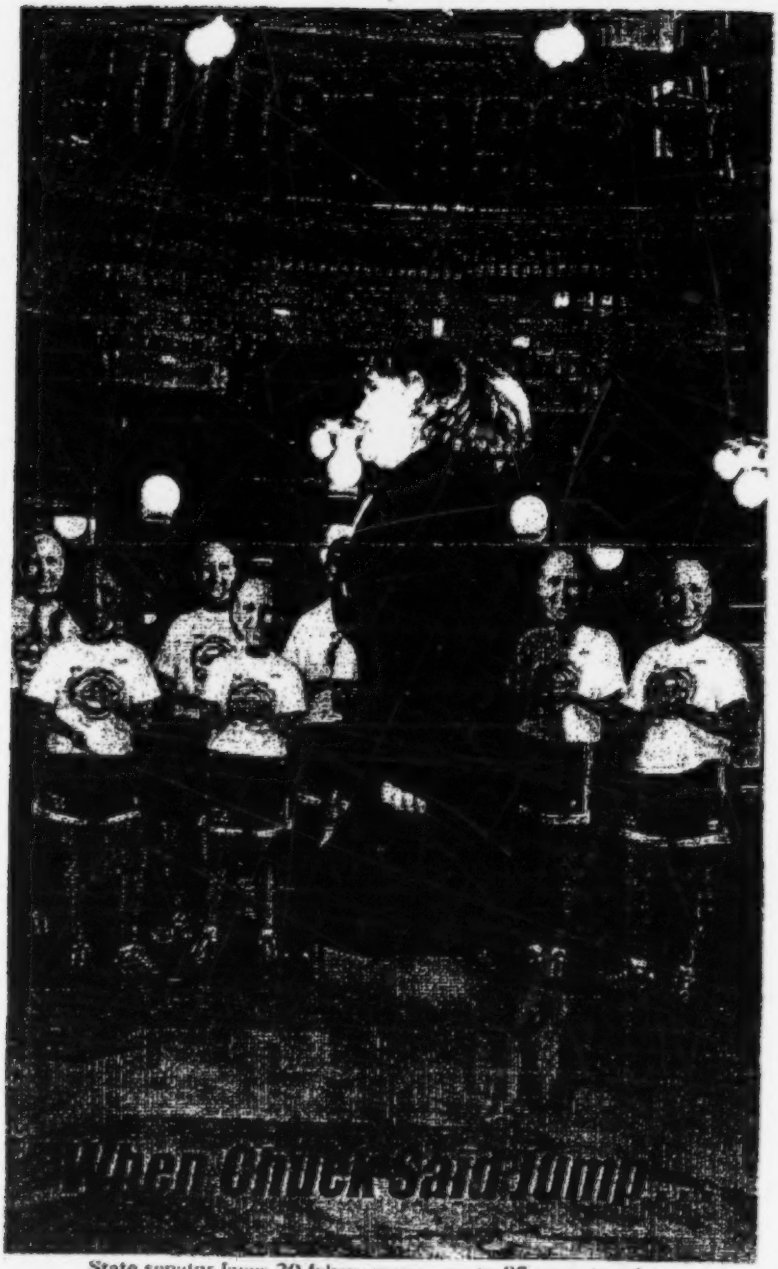
Case No. 2004AP377 Julie M. Lassa v. Todd Rongstad
Circuit Court Case No.
2003CV177

The court having considered the **Motion for Reconsideration** filed in the above matter,

IT IS ORDERED that the Motion for Reconsideration is denied, with $50.00 costs.

Wilcox, J., Crooks, J. and Roggensack, J. did not participate.

Cornelia G. Clark
Clerk of Supreme Court



State senator faces 20 felony counts, up to 85 years in prison

Chvala charged with extortion

Jensen, other GOP lawmakers expected to be charged today

Democrat to quit minority leader post, ... are political

BEST AVAILABLE COPY

A public service announcement from the Alliance for a Working Wisconsin

Lassa Wanted To Be A State Senator,

So She Hooked Up[With Chuck Chvala.

A Tale of Wisconsin Politics

One day, Representative Julie Lassa decided she wanted to be a state senator. So she asked Senate Leader Chuck Chvala if she could, and he said okay.

Nobody knows for sure what she had to promise to gain his approval. But Chuck wanted a more compliant senator, so he got to work.

What he did best was fundraise with unsubtle threats. Populist Chvala even sponsored a Lassa fundraiser at the state's ritziest country club.

Chvala didn't care much for dissent. And he was giddy with the idea of Senator Julie.

Just like the old days when party bosses made decisions for us all.

But then Lassa's mentor was charged with 20 felonies and things fell apart.

The End?

Extortion, misconduct in public office, pay to play, lying, cheating and stealing. Wisconsin politics has gone completely astray. Please call Julie Lassa ··· and the rest and ask them the tough questions-did you compromise your integrity, did you play along with an illegal game, did you misuse tax dollars to win elections? And, most importantly, will you please clean up your act?

A public service announcement from the Alliance for a Working Wisconsin.

APPENDIX J

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 13

Julie M. Lassa
1900 Clark Street
Stevens Point, WI 54481
Plaintiff,

v.

Case No. 03-CV-0177
Code No. 30106
INTENTIONAL TORT

Todd Rongstad,
as president of Valkyrie Group, LLC. and
as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

The Valkyrie Group, LLC
108 W. 3rd St.
Waunakee, WI 53597,

A.M. Mailing Services, Inc.
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

Does 1-5, in their individual capacities,
Defendants,

AFFIDAVIT OF MICHAEL P. CROOKS
IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

STATE OF WISCONSIN)
) ss:
COUNTY OF DANE)

MICHAEL P. CROOKS, being first duly sworn under oath, deposes and states as follows:

1. That attached hereto as Exhibit A is a true and correct copy of a letter received form Attorney Garvey, after filing the motion for protective order and supporting documents.

2. That Attorney Garvey raises lack of proof with respect to Mr. Rongstad's unavailability. That attached hereto as Exhibit B and incorporated fully herein by reference is a true and correct copy of an affidavit of Mr. Rongstad relative to his unavailability on January 30, 2003.

3. That on January 30, 2003, your affiant has scheduled a pre-trial conference at 9:00 a.m., in a deposition of Dr. Nolte at 9:30 a.m. in Janesville, and a motion to dismiss in Mauston at 1:00 p.m.

4. That Mr. Rongstad has specifically requested that your affiant handle the deposition at issue, due to the sensitive nature of the case.

5. Further, as is made obvious by Attorney Garvey's letter, this lawsuit has little to do with the merits of the case and everything to do with some type of political motivation. In fact, that is the reason given by Attorney Garvey for wanting to go forward with the deposition as scheduled.

6. It is the opinion of your affiant that the lawsuit at issue may be frivolous pursuant to §814.025, in that at the time of the alleged defamation at issue in this case, Ms. Lassa, the plaintiff, was a public official, allowing for the defense of absolute immunity.

7. That as mentioned in the initial moving papers, your affiant plans on filing a motion to dismiss the complaint in its entirety, as the same fails to state a claim upon which relief can be granted.

8. That the defendants request an adjournment of any depositions until after the Court has an opportunity to hear said motion.

APPENDIX K

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 13

JULIE M. LASSA,

Plaintiff,

MOTION FOR PROTECTIVE ORDER

-vs-

Case No. 03-CV-177

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES 1-5, In Their Individual Capacities

Defendants.

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 29th day of January, 2003, commencing at 11:30 o'clock a.m.

PRESIDING: **HONORABLE MICHAEL N. NOWAKOWSKI**
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendant Todd Rongstad, The Valkyrie Group and Does 1-5.

Laura Stuessy, RMR, CRR
Official Court Reporter

discovery and get my client in a deposition setting so that he can ask him questions that are somehow going to be determinative of whether his client runs for State Senate, that's not a legitimate purpose for filing a lawsuit.

There are principles of absolute immunity that are applicable in a defamation suit involving a public official. The Court is probably familiar with the case of Sullivan v The New York Times. There are also issues of advocacy that come into play, and we intend to file a motion to dismiss the entire lawsuit within a week to 10 days.

And to subject him to the deposition process under the guise of a legitimate lawsuit is not right, number one. Number two, I'm not available and he's not available, so those are the bases for the motion, and the rest of it is set forth in the pleadings and the papers that have been filed with the Court.

THE COURT: Mr. Garvey?

MR. GARVEY: Your Honor, this suit was filed on the 16th of January. The defendant was quoted in the papers the next day on the 17th with respect to the suit. We diligently tried to serve him. We finally did on the 22nd.

Mr. Crooks suggests a number of things, but he

doing so on the basis of conflicts, one would assume that you would bring your calendar along so that we'd be able to determine what the dates are when there are not conflicts.

MR. CROOKS: Judge, if I may speak to that, I originally had thought this was by telephone and was going to have Mr. Rongstad on the line, so I rushed over here at the last minute, didn't grab my calendar and don't have Mr. Rongstad, obviously, on the line because nobody appeared by phone. But I would be happy to sit down with counsel when I leave here and pick a mutually convenient date.

THE COURT: Well, you're asking me today to quash a subpoena for a specific date, and what I'm willing to do is only this. I will quash that on the condition that you by the end of the day today provide an alternative date Friday, August – I'm sorry, Friday, January 31st for this deposition to go forward.

If you or your client cannot come up with a better date on the 31st than the date it's presently scheduled, then it will simply proceed on the 30th, and your client and yourself will have to make the necessary accommodations to be available at that time. I would have hoped we could have come up with

the specific date right now, but obviously that's not going to be possible.

I will make this point with respect to some of the contentions that you've raised. There is no basis under the law to say that simply because someone has only recently been served and represents that they intend to file a motion to dismiss the case that they are therefore immune from or not subject to having their deposition taken. That simply is not a principle of law that applies.

Now, there may be extenuating circumstances. There may be a situation where subjecting somebody to a deposition in fact involves the kind of burden and inconvenience and oppression that would justify a stay to allow the motion to dismiss to be decided and then allow the deposition to go forward, if in fact the case is going to go forward. No showing has been made that this is such a case.

The other thing that is apparent from the pleadings and the rather sparse information that's in the file is that there are other defendants who have not been served, have not been named and have only been identified as Does that Mr. Garvey and his client are entitled to try and find out who they are so as to properly join them and, in turn, allow their

circumstances to be considered ultimately in this lawsuit and in the questions of immunity that you allude to. So maybe the exception to the immunity provided under the Sullivan case might be applicable to your client, maybe not. But it wouldn't be applicable perhaps, and the facts may reveal that it wouldn't be applicable to some of these other people.

While your client is properly joined, is under the jurisdiction of the court, there's no reason why he should not answer questions at a deposition that would allow Mr. Garvey to identify who these other defendants are. He's operating under a statutory obligation to join them within a certain period of time, and I haven't been given any good reason why there should be any delay in that.

Finally, I read Mr. Garvey's letter in which he alludes to the political nature of the case, and obviously, what this is all about as the Complaint reveals is a mailing that was done in the context of a political campaign, but I don't read the letter as suggesting that Mr. Garvey and his client have filed the lawsuit solely for political reasons or solely as a basis to try to do something that will allow his client to make a decision about whether she's going to run for this Senate seat.

I think he alludes to the fact that she's considering running for a Senate seat, which I think since the letter was written now is clearly an open seat since I think the incumbent's appointment to a different position was confirmed yesterday. I take judicial notice of that from the newspapers. But I don't see it necessarily as a case that involves an improper motive that would suggest that there simply is no merit to it.

For all of those reasons and for the reason that Ms. Lassa has also requested ultimately injunctive relief in this case which is aimed at clearing her name, clearing her name is a quite legitimate purpose of a defamation case and that seems explicitly to be one of the purposes that she's seeking to accomplish by virtue of this litigation, and further delay to the extent she chooses to run for this seat will exacerbate the impact, whatever it may be, of the mailing that apparently or allegedly was generated from your client.

So for all of those reasons, I simply am not persuaded that there's any reason to delay, certainly not to delay as was suggested until a motion to dismiss was filed and briefed and decided. And as a practical matter now, there's no information that I

have that would suggest a reason to delay beyond giving you the consideration of rescheduling this to a better date on Friday, or better time on Friday than is presently set for it, or perhaps a better time on Thursday. I don't know how long your trip to Mauston is going to take, and maybe you can schedule this late in the afternoon on Thursday and that may be able to accommodate everybody's schedule.

So the motion will be granted in that conditional fashion, and we'll simply leave it for you folks to come up with an alternative time, if that's possible, on Friday. If it's not, then it will go forward on the time it's presently scheduled, but I do want to emphasize to Mr. Garvey that any time that Mr. Crooks and his client can offer to be available on Friday would be considered an acceptable time, so I'm not giving you the ability to veto. If they say, "Well, we could be there at 8 o'clock in the morning on Friday," and you say, "Well, I don't like to get to the office till 10:00," that's not going to work.

MR. GARVEY: Your Honor, I can assure you that any time on Friday is fine, or Thursday.

MR. CROOKS: Judge, while we're all still here, could I call my office and see if I am

APPENDIX L

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JULIE M. LASSA

Plaintiff,

v.

Case No. 03-CV-177
Case Code: 30106

TODD RONGSTAD,
THE VALKYRIE GROUP, LLC
A.M. MAILING SERVICES, INC.,

and

Does, 1-5, in their individual capacities

Defendants

TRANSCRIPT OF PROCEEDINGS,

was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, JESSICA WENDORFF, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Suite 101, Madison, Wisconsin, on the 4th day of February 2003, commencing at 11:46 o'clock in the forenoon.

16th or thereabouts, January 15th perhaps. My client was served on January 22nd and ordered by the Court to sit for a deposition some 11 days after service.

The Court started out the call by saying, What is the urgency here? I am not sure what the urgency is relative to conducting the discovery. But the urgency from the standpoint of Mr. Rongstad is his 501(c)(4) Alliance group, the Alliance for a Working Wisconsin, who is named in the suit, and he, as president, have both 1st and 14th Amendment constitutional rights here. And what we're faced with is a defamation lawsuit, allegations of defamation by a public official. And as the Court knows, the standard for proving such is it's very high.

And simply by making these allegations, if we rely on Judge Nowakowski's order of this morning, Mr. Rongstad and all the of the Alliance's constitutional rights are overridden simply by allegations of defamation. What we have here, your Honor, is essentially a Hobson's Choice. Either Mr. Rongstad answers the questions and he waives his constitutional

rights, those of other members -

MR. GARVEY: May I ask a questions, Mike? I don't mean to interrupt. Can I ask you a questions? Are you suggesting we're asking you to name the members of this organization?

MR. CROOKS: What I said yesterday - and there's been a lot of water under the bridge - I think the representation made when we started going into the areas of membership and who might have seen the card or paid for the card or put together the card or contributed to the organization that put together the card was that by naming those very people, we're getting into the membership issues, those very issues that are protected by NAACP versus Alabama, Buckley versus Valeo, McIntyre versus Ohio Elections Commission, and the like. And, as a result, I don't care how we get at tit. Mr. Garvey is a very skilled advocate, and he can come at it from very different angles. The bottom line is, Judge, he's trying to find out who the members of this issue advocacy group are either through the back door or the front door.

maybe she won't on the other side, that it clearly, the tables are clearly slanted in favor of protecting the constitutional rights.

MR. GARVEY: Your Honor, this is Ed Garvey. Perhaps you've heard my voice enough anyway. But I'll simply say that Judge Nowakowski heard all of this this morning and yesterday from Mr. Crooks. He read all the cases. We have read the cases. And nothing new has come up that would change a very thoughtful decision by Judge Nowakowski. This is not the State of Wisconsin going after somebody's membership list. We are looking at a matter of defamation and trying to find out who's involved.

MR. CROOKS: Judge, we're looking at alleged defamation. The merits do bear some consideration. Defamation has not been proved here, and that's a legal determination that we ask the Court to make prior to forcing us to go through this exercise. And we're denied in that regard as well.

MR. GARVEY: I don't think that's right.

THE COURT: let me ask my question

about it --

MR. GARVEY: When did that happen?

THE COURT: I'm sorry. Go ahead and clarify that.

MR. GARVEY: I have not idea what he's talking about. He asked the Court to declare this was defamatory or not.

MR. CROOKS: I asked the Court to stay this so we could file a motion to dismiss on legal grounds, to stay the whole proceedings, and that was denied.

THE COURT: I have a question about relevancy and whether there was anything before Judge Nowakowski that went from that angle. Earlier I was positing the notion that under Judge Nowakowski's order Mr. Garvey could ask who's involved in the sense that who funded it and if the underlying facts are that it was funded by some general fund contributed to by all the members. And the effect of that is you would disclose all the members. Now, if a member's only connection to the mailing was that they contributed some amount of money to this organization, then the questions that comes to my mind is relevancy. Has there been any

MR GARVEY: Mr. Crooks.

MR. CROOKS: This is the first time I get to go first in this process.

THE COURT: Mr. Garvey must want the last word.

MR. CROOKS: Apparently so. Judge, I guess just to reiterate and summarize the points I've made, there are significant constitutional issues here. In the normal course of how lawsuits are filed and conducted, we would have had an opportunity to brief these, especially given the significance of the issues.

I'm doing everything I can to do things as quickly as I can to not cause undue delay. But I think that for the Court not to examine the case law and to examine the facts behind this and to instead order - in the face of mere defamatory allegations, to order disclosure of the names of membership and/or any folks involved at all in the membership, including sources of funding, whether they had anything to do with the postcard at issue or not, is violative of the 1st and 14th Amendment of the U.S. Constitution as well as IRS Rule

501(c)(4).

I believe, Judge, this will and clearly is intended to have a chilling effect on members of the organization, an issue advocacy group, a political organization sanctioned by the IRS that can do issue advocacy and that protects the right to keep the membership private. That interest, those constitutional interests, outweigh the interest that the plaintiffs have in discovering the membership at issue.

And if it's limited, your Honor - but Judge Nowakowski didn't limit it. If it were somehow limited to those who had direct involvement with respect to the postcard and its content, that's a different issue. But he's given the plaintiffs carte blanche. And I think that's an invasion of the protected rights.

THE COURT: All I can do is review the cases that I do have in front of me and see if I can find that they're applicable to your private plaintiff situation as best I can and make a quick decision on that.

MR. GARVEY: Do I get my chance now?

THE COURT: That's right. You are

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No. 06-1084

IN THE

Supreme Court of the United States

TODD RONGSTAD, AND THE VALKYRIE GROUP, LLC
Petitioners,

v.

JULIE M. LASSA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

RESPONDENT'S BRIEF IN OPPOSITION

EDWARD R. GARVEY *
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QUESTIONS PRESENTED

1. Whether a defendant who fails to avail himself of state civil procedure, and whose statements are found to be capable of defamatory meaning, may nevertheless refuse to disclose the identity of individuals involved in defaming the plaintiff.

2. Whether review of a state court's interpretation of law is warranted where the petitioner seeks certiorari on an interpretation that was not argued to the courts below and that would not change the outcome under the facts of the case.

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IN THE

Supreme Court of the United States

No. 06-1084

TODD RONGSTAD, AND THE VALKYRIE GROUP, LLC
Petitioners,

v.

JULIE M. LASSA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction.

This case concerns a garden variety failure of a litigant to exercise his state statutory and procedural rights on a timely basis. Those failures were expressly identified and correctly applied by the Wisconsin Supreme Court. This case is not about the Wisconsin Supreme Court's failure to recognize a constitutional issue or failure to apply appropriate constitutional principles. Any grant of certiorari relative to this case, Respondent respectfully submits, would be improvident.

Defamatory Postcard.

On January 16, 2003, plaintiff Julie Lassa, then a state assemblyperson, filed a civil action alleging the intentional

tort of defamation under Wisconsin law.[1] Resp't App. 1a-2a.[2] The claim arose from an oversized postcard that untruthfully charged Lassa with illegal, dishonorable, unethical, and unprofessional conduct, and tied her to a state senate leader who had recently been indicted on felony charges for extortion. The mailer conveyed to its readers that Lassa was engaged in felonious activity.

The postcard was mailed out just before the 2002 state assembly elections; yet, it referred to Lassa's candidacy for state senate, not assembly, and was mailed to constituents in the senate district. While Lassa was not a candidate for senate at the time the postcard was mailed, it was widely predicted that the state senate seat she now holds would become vacant.

The complaint named defendants Todd Rongstad and his consulting firm, the Valkyrie Group, LLC (hereinafter collectively referred to as "Rongstad"), and "Does, 1-5,"[3] persons whose identities Lassa did not then know but believed were likely involved in the production, mailing, and financing of the postcard.

Lassa brought suit for the legitimate purpose of clearing her name in the eyes of her constituents as a state assemblyperson and a potential candidate for state senate, and to recover damages, after being subjected to defamatory attacks by Todd Rongstad and the Alliance for a Working Wisconsin ("AWW"). To prosecute her defamation claims, Lassa, a public figure, was required to prove actual malice.

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[1] For purposes of Respondent's opposition brief to the petition for certiorari, Lassa assumes that the Court will treat this postcard as defamatory as this issue is not raised in the petition.

[2] The Respondent's appendix contains a color copy of the mailer.

[3] Wisconsin law allows naming of unknown defendants by fictitious name.

To prove the state of mind element, she needed to discover who was involved in the production and distribution of the mailer since proving state of mind begins with determining whose mind is at issue. Rongstad was the only known source of that information.

The Nature of the Alliance for a Working Wisconsin

During his depositions between February 3 and March 11, 2003, Rongstad testified that he was the president and founder of the Valkyrie Group. Rongstad also claimed to be the president and CEO of the AWW, which he said was an issue advocacy organization. Rongstad admitted to producing the Lassa attack postcard on behalf of the AWW.

Yet, his testimony regarding the nature of the AWW was inconsistent. Rongstad admitted that he discussed the Lassa matter with a couple of "members" of the AWW (Resp't App. 5a, 6a), while also claiming that he did not discuss it with anyone (Resp't App. 8a-10a). He testified that the AWW had more than ten members (Resp't App. 4a), but the articles of incorporation of AWW stated that it "shall have no members" (Resp't App. 13a-16a). Rongstad testified that no dues were required for membership and that there were no specific criteria for becoming a member. Resp't App. 3a-4a, 11a-12a. In fact, Rongstad testified that "supporters of the organization are often considered as members of the organization." Resp't App. 12a. According to Rongstad, it was simply up to him, as the president of the organization, to determine who was a "member." Resp't App. 4a, 12a, 15a-16a.

Despite the inconsistent testimony regarding membership, Rongstad testified that people with whom he discussed the Lassa mailer were all "members," and refused to answer whether or not any one else was involved because it would identify the AWW members. In other words, by asserting that everyone else involved with the mailer was a "member,"

Rongstad attempted to shield the unnamed defendants from disclosure.

Rongstad also refused to say who contributed money that paid for the production and distribution of the postcard. Throughout his depositions, Rongstad tried to take sole responsibility for targeting Lassa, and yet he ultimately admitted receiving at least one contribution to the AWW during the three months leading up to the Lassa mailing. The source of that money was later revealed as Lassa's state senate primary race opponent, Alex Paul, though the money was contributed through another individual.

Proceedings and Disposition in the State Courts

A. Initial Discovery Order

On January 22, 2003, Lassa's attorneys served Rongstad with a notice of deposition for January 30, 2003. Rongstad moved the trial court for an order postponing the deposition based on inconvenience, a claim of "absolute immunity," and a claim that the lawsuit was filed for the illegitimate purpose of allowing plaintiff to determine whether to run for state senate. Resp't App. 18a; Pet. App. 111a. The trial court granted Rongstad's request to postpone the deposition until February 3, 2003, as a matter of convenience; the court denied Rongstad's other claims. Resp't App. 18a-21a.

The deposition was held on February 3, 2003. During the deposition, Rongstad refused to answer proper deposition questions regarding the identities of those who supported the Lassa postcard campaign. Lassa immediately moved to compel and the deposition was halted for a telephone hearing on Lassa's motion. Also at the hearing on February 3rd, Rongstad's counsel argued that disclosing the identities of those who supported the Lassa mailer would violate the First and Fourteenth Amendments, and provided the trial court with a list of case law he believed supported Rongstad's claim of

privilege.[4] Rongstad's counsel requested to brief the issue; however, he proffered no evidentiary support for a privilege claim, nor did he even notify the court that he intended to provide any. While the court declined Rongstad's request to provide further argument through briefing, the trial judge informed the parties that he would consult the cases cited and rule on the asserted constitutional privilege the following morning.

The trial court reconvened the next morning and allowed Rongstad to present further argument and to proffer evidence. Resp't App. 23a-25a. Applying cases cited by Rongstad's counsel, the court weighed the interests of Rongstad and AWW members in concealing membership information against the interests of Lassa in clearing her name and discovering who was involved in the mailer, as well as the public's interest in preventing libel during an election cycle. Pet. App. 81a-85a (applying *NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)). The trial court found that there were no less intrusive measures that would allow Lassa to redress her defamation claim against the unknown defendants. Therefore, the trial court ordered Rongstad to "answer all questions inquiring as to the names and behavior of any other persons involved in the preparation, funding or distribution of the mailing." Pet. App. 13a.

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[4] Rongstad's counsel listed these cases in the following order: *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Torgerson v. Journal/ Sentinel, Inc.*, 563 N.W.2d 472 (Wis. 1997); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999); *McIntyre v. Bd. of Elections*, 514 U.S. 334 (1995); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. N.Y.*, 268 U.S. 652 (1925); *Wis. Socialist Workers v. E. Michael McCann*, 433 F. Supp. 540 (E.D. Wis. 1977).

At the same hearing, Rongstad moved for a stay to seek a supervisory writ from the Wisconsin Court of Appeals, the state's intermediate appellate court. In denying the stay, the trial court found very little likelihood of success in the petition for a supervisory writ. Furthermore, the court considered the harm to the plaintiff in further delay due to the upcoming special election for state senate.[5]

Following the motion hearing on February 4, 2003, the Rongstad deposition continued. Rongstad again refused to respond to questions about AWW, asserting the same argument rejected by the court earlier that day.

B. Request for Stay to the Wisconsin Court of Appeals

Also on February 4, 2003, Rongstad moved the court of appeals for a supervisory writ to stay the order of the trial court and requested leave to appeal the interlocutory order.[6] Finding no misuse of discretion by the trial court, the court of appeals denied the request for a stay that same day. However, Rongstad continued to refuse to answer questions regarding persons involved in the planning, preparation, and funding of the Lassa postcard.

C. Motion for Reconsideration Hearing

On February 5, 2003, Rongstad filed a motion in the trial court to reconsider the court's February 4th order. The motion for reconsideration was heard on February 6, 2003. For the reconsideration hearing, Rongstad produced an affidavit

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[5] On the date of the discovery hearing, the court noted that the special election had not yet been scheduled but that the senate seat was vacant. The governor later called the primary for April 1, 2003, and the special election for April 29, 2003.

[6] Rongstad's motion was captioned as a petition for supervisory writ; however, Rongstad's counsel informed the Court that the motion should be treated as a request for a stay.

containing conclusory assertions that he would not disclose members' names[7] due to the alleged members' "fear of public reprisal and potential legal actions" and because disclosure would "likely ruin [his] business and force him to find a new career." Resp't App. 27a. The affidavit was the only evidence presented by Rongstad in all of the trial court proceedings that his "members" feared negative effects from public disclosure of their association with AWW.

Citing *NAACP v. Alabama* and *Buckley v. Valeo*, the trial court found that, while "the quantum of proof" needed "ought to be set pretty low," Rongstad's "conclusory allegations and references to fear of a lawsuit [were] simply so low that they [did] not satisfy the *Buckley* requisite factual showing." Pet. App. 94a-95a. The court ordered Rongstad to appear at a continued deposition on February 11, 2003.

At the continuation of Rongstad's deposition, Rongstad contradicted his affidavit by stating that, in fact, *no* members contacted him about this lawsuit. Resp't App. 29a. Moreover, Rongstad testified that the sole basis for his claim that he had "guaranteed confidentiality with respect to the identity of his members" (Resp't App. 27a) was a statement on an AWW brochure that claimed to offer AWW supporters confidentiality and that, according to Rongstad, "anyone who contributed to the organization would have seen" (Resp't App. 28a). In other words, Rongstad refuted his February 5th affidavit, in which he testified that he had discussed this lawsuit with AWW "members," that they expressed fear of public reprisal, and that they were concerned because he had allegedly guaranteed that their identities would remain confidential.

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[7] Inconsistently, Rongstad's counsel also argued at the hearing that Rongstad had *already* complied with the discovery orders.

D. Lassa's Motion to Find Rongstad in Contempt

On February 21, 2003, Lassa moved the trial court to find Mr. Rongstad in contempt of the court's discovery orders, and to impose sanctions for his repeated failures to produce properly requested discovery. On February 28, 2003, the court heard argument on the motion for discovery sanctions, including the sanction of finding Rongstad in contempt of the court's orders. Rongstad, by his counsel, again asserted the same constitutional privilege. Again finding that Rongstad failed to support his assertion of privilege, the trial court ordered Rongstad to appear at a continued deposition on March 3, 2003, to address the questions of who supported AWW as it related to the Lassa mailer. Rather than leaving the contribution amount and dates open-ended, the court ordered Rongstad specifically to identify those who contributed more than $100 to AWW in 2002. The court set a continued hearing on the contempt sanction for March 11, 2003.

On March 3, 2003, the deposition continued. Rongstad's counsel restated the same constitutional privilege and Rongstad refused to answer questions as directed by the circuit court's orders of February 4, 6, 11, and 28, 2003.

On March 11, 2003, the contempt hearing continued. This time, Rongstad did not dispute that he failed to comply with the court's discovery orders. Finding Rongstad in contempt, the trial court sanctioned Rongstad under Wisconsin's discovery statutes. Additionally, the trial court stated that it would entertain a motion for default judgment if, by April 4, 2003, Rongstad did not comply with the discovery orders.

E. Rongstad's Failure to Pursue Appellate Review

On March 4, 2003, the Wisconsin Court of Appeals denied Rongstad's petition for interlocutory review of the trial court's February 4, 2003, discovery order, "[b]ecause it appear[ed] that Rongstad no longer wishes to seek interlocutory review of the circuit court's order." Resp't App.

30a-31a. Rongstad had let the time run for filing argument on the merits of the petition for leave and, thus, the petition was denied.

On April 1, 2003, the Wisconsin Court of Appeals denied Rongstad's second petition for review of the trial court's February 28 and March 11, 2003 orders, because the court of appeals does not take permissive appeals from oral orders. Resp't App. 32a-33a. When the sanctions orders were reduced to written order on April 2, 2003, Rongstad failed to seek an appeal.

Also on April 1, 2003, the court of appeals dismissed Rongstad's petitions for supervisory writ regarding the trial court's February 28 and March 11, 2003, orders, and found that "Rongstad has not shown that the circuit court has a duty to vacate its orders."[8] Resp't App. 34a-35a.

F. Denial of the Motion to Dismiss

After the trial court issued its initial discovery orders on February 11, 2003, Rongstad filed a motion to dismiss Lassa's complaint on the grounds that Lassa had failed to state a claim upon which relief can be granted. This was Rongstad's first motion attacking the pleadings and their sufficiency to state a claim. On February 13, 2003, the court set a briefing schedule for the motion to dismiss with reply briefs due by March 28, 2003. Rongstad did not object to this schedule and did not request an accelerated briefing schedule. The hearing on Rongstad's motion to dismiss was then delayed by a stay pending the disposition of Rongstad's

[8] Petitioners erroneously state that "Rongstad promptly filed with the Supreme Court of Wisconsin a petition for leave to appeal the court's contempt and sanctions order and petition for supervisory writ . . . ." Pet. at 7 n.3.

insurance coverage. Here again, Rongstad failed to object to the stay on his motion to dismiss. Resp't App. 37a-39a.

The stay was lifted on June 26, 2003, and on July 8, 2003, the trial court held a hearing on Rongstad's motion to dismiss. In denying Rongstad's motion to dismiss, the court found that:

> Reading words and viewing the picture of the mailer in the plain and ordinary sense, I do reach the conclusion that there is language capable of defamatory meaning.
>
> The mailer conveys the impression that Lassa is Senator Chvala's lackey, basically, and implies that she has also engaged or is about to engage in the same kind of allegedly unlawful and unethical conduct that Senator Chvala was accused of. . . .

R. 151:4.[9] In short, the court found that Lassa had pled a valid claim and that the mailer was, in fact, capable of defamatory meaning.

G. Final Sanctions Rulings

After the court found the postcard capable of defamatory meaning, on August 15, 2003, the trial court ruled on two pending motions: Rongstad's motion for relief from the sanctions and Lassa's motion to enter a default judgment. Rongstad reargued the same constitutional privilege as grounds for relief from sanctions. The court ruled that Rongstad continued to be in contempt of the trial court's two written orders and denied Rongstad's motion for relief from sanctions. R. 152: 28. At the same hearing, the trial court granted Lassa's motion for default judgment as a further

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[9] The citation to the record from the Wisconsin Supreme Court is referred to as "R. [document number]:[page number]."

sanction for refusing to comply with the discovery orders.[10] R. 152:46.

H. Final Disposition of the Case through Settlement

The trial court's final order, entered on November 17, 2003, approved a settlement agreement drafted by the parties dismissing the defamation cause of action with prejudice, keeping intact the monetary sanctions, but permitting appeal.[11]

I. Review by the Highest Court of the State

On July 13, 2006, the Wisconsin Supreme Court issued its decision on the appeal of this matter, finding:

(A) In defamation cases, circuit courts should ordinarily decide a pending motion to dismiss for failure to state a claim before sanctioning a party for refusing to disclose information that would identify otherwise-anonymous members of an organization. Under the circumstances here, however, the circuit court did not erroneously exercise its discretion in compelling discovery and imposing sanctions before deciding Rongstad's motion to dismiss.[12]

(B) The circuit court properly rejected Rongstad's assertion of privilege under the balancing test of the NAACP line of cases because Rongstad failed to

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[10] Petitioners mistakenly assert that the default judgment was issued because Rongstad failed "to provide sufficient details about the contributors of the Alliance." Pet. at 7. The default judgment was granted as further sanction for not complying with the court's discovery orders that would allow Lassa to discover who was responsible for the attack postcard. R. 152:43-46.

[11] Rongstad appealed to the Wisconsin Court of Appeals; however, the case was certified directly to the Wisconsin Supreme Court, the highest court of the state.

[12] Majority opinion of the Wisconsin Supreme Court.

> make the required preliminary factual showing to support his assertion.[13]

Pet. App. 3a, ¶ 5 (*Lassa v. Rongstad*, 718 N.W.2d 673 (Wis. 2006)) (footnotes added).[14]

On a motion for reconsideration to the Wisconsin Supreme Court, Rongstad reargued his claim that the lower court should have heard his motion to dismiss before ordering disclosure of those involved with the mailer, and argued *for the first time* that the trial court applied the wrong standard under *NAACP v. Alabama* and *Buckley v. Valeo*. The Wisconsin Supreme Court denied the motion for reconsideration without analysis or comment.

REASONS FOR DENYING THE PETITION

I. ASSERTIONS RELATED TO THE TIMING OF THE MOTION TO DISMISS MISREPRESENT THE RECORD AND THE PROCEDURAL REQUIREMENTS UNDER WISCONSIN LAW.

A. Rongstad acquiesced to the order of the proceedings in the trial court and made no constitutional objection based on timing of the motion to dismiss.

As is evident in the extensive trial court record, Rongstad failed to raise a question of whether the sufficiency of the pleadings had to be tested as a constitutional matter before the court ordered disclosure of those who targeted Lassa. Yet, in his petition, Rongstad argues that the Wisconsin Supreme Court erred by finding that he waived his objection to the timing of the hearing on the motion to dismiss. According to Rongstad, the trial court should have known that he was

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[13] Lead opinion of the Wisconsin Supreme Court.

[14] Hereinafter references to the opinion below are only to the Petitioners' Appendix.

arguing on constitutional grounds that the court must rule on his motion to dismiss before any discovery could be compelled, even though 1) Rongstad did not file a motion to dismiss until after the first two discovery orders were issued, and 2) he never made a request to the trial court to stay discovery once his motion was filed. Rongstad disingenuously refers to "the motion to dismiss" as if it had been filed before the trial court issued its discovery orders. *See* Pet. at 28. Despite Rongstad's allusions to the contrary, there was no pending motion to dismiss, nor any other challenge to the sufficiency of the facts to support defamation, when the orders compelling discovery were issued.

In an attempt to bolster the record, Rongstad characterizes the arguments that he made during the protective order hearing on January 29, 2003, (the first dispute heard by the trial court in this case) as if he argued that a motion to dismiss should be addressed before discovery proceed to protect his members' constitutional right to speak anonymously. He made no such argument. On January 29th, Rongstad asked the trial court for a protective order primarily on the basis that the deposition time was inconvenient to him.[15] While Rongstad's counsel stated that he *intended* to file a motion to dismiss for failure to state a claim, *it was not filed at the time*.

Under Rongstad's most recent iteration of the facts, he claims to have raised a constitutional privilege under *New York Times v. Sullivan*, 376 U.S. 254 (1964). In fact, counsel provided no grounds for such a motion, other than asserting a vague and unsupported "defense of absolute immunity" and an unsupported belief that the lawsuit was for "political motivation." Rongstad's *only* argument related to a constitu-

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[15] For example, Rongstad stated in his brief in support of the protective order that "Defendants do not request that the discovery sought not go forward at a more appropriate time." R:5:3.

tional privilege in his motion for protective order was as follows:

> There are principles of *absolute immunity* that are applicable in a defamation suit involving a public official. The Court is probably familiar with the case of *Sullivan v. The New York Times* [sic]. There are issues of advocacy that come into play, and *we intend to file* a motion to dismiss the entire lawsuit within a week to 10 days.

Resp't App. 24a (emphasis added). The trial court correctly interpreted *Sullivan*—the sole case cited by Rongstad—as providing no "absolute immunity" from suit as asserted by Rongstad. Resp't App. 19a-20a; *see also Sullivan*, 376 U.S. at 282-83 (holding that a public official must demonstrate actual malice in a defamation suit, but not banning such a suit altogether). Thus, the trial court correctly found that Rongstad presented an erroneous principle of law and did not order a stay. *See* Pet. App. 17a-18a, ¶ 43.

Giving Rongstad the benefit of the doubt, the trial court invited Rongstad to file a motion to dismiss and to show circumstances supporting a stay of discovery until the motion had been decided, but added that as of January 29th, "[n]o showing has been made that this is such a case." Resp't App. 19a. Rongstad declined the court's invitation.[16] Instead, he delayed filing a motion to dismiss until February 11, 2003, *after* the trial court issued its discovery orders and after

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[16] Petitioners misstate the record by claiming that the trial court "had already rejected Rongstad's claim of constitutional privilege and made it clear that it would not stay discovery pending a decision on his motion to dismiss"; and therefore it would have been "fruitless" to object further. Pet. at 19. To the contrary, the trial court refused to give an advisory opinion, noted that there was no pending motion, and invited counsel for Rongstad to file his motion to dismiss and take up the issue of a stay at that time. No motion to stay was ever filed based upon a pending motion to dismiss.

the court of appeals denied his request for a stay and for interlocutory review of those discovery orders.[17] Rongstad did not request a stay or expedited review based on his motion to dismiss, nor did he take any other action to ask the trial court to address his motion to dismiss before additional discovery matters were addressed.[18] At best, "[i]t was not until April 30, 2003, that Rongstad first apprised the [trial] court of the argument that he now advances, that the court was required to decide his motion to dismiss before compelling discovery." Pet. App. 22a, ¶ 56.[19] By that time, the trial court had already issued its discovery orders and imposed discovery sanctions. *Id.*

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[17] Petitioners again misstate the record below by asserting that Rongstad raised the issue of the timing of hearing the motion to dismiss on constitutional grounds to the court of appeals. Pet. at 5 n.2. Counsel for Rongstad only asked for a stay on the grounds that the trial court abused its power when it issued the February 4th discovery order. He did not ask the court to address the question of the timing of the motion to dismiss. In fact, when he filed his request for stay to the court of appeals, there was no pending motion to dismiss. The court of appeals denied the request for stay on February 4, 2003.

[18] Petitioners imply that the trial court was asked to set a different briefing schedule. Pet. at 6 ("The court refused to schedule the motion for a prompt hearing . . ."). There was never a request for a different briefing schedule, even when the court stayed the case on the merits pending a resolution of defendants' insurance coverage, which included a stay of the then-pending motion to dismiss.

[19] April 30, 2003, was the first time any issue related to hearing the motion to dismiss was raised. As the supreme court related:

> On that date, Rongstad filed a letter with the court in which he requested that it address his motion to dismiss before resolving any other pending motions because this would "eliminate the need for any further action." In our view, however, even this April 30 letter did not apprise the circuit court of the argument Rongstad now makes.

Pet. App. 22a, ¶ 56 (quoting Rongstad's April 30th letter).

Moreover, contrary to Rongstad's suggestion, the trial court determined that the mailer was capable of defamatory meaning prior to addressing Rongstad's motion for relief from sanctions and Lassa's motion for default judgment as a further sanction. In other words, sanctions were not finally assessed until after the court made the finding that the complaint stated a claim for defamation.

The state supreme court reviewed, in detail, the facts in the record related to the process given the motion to dismiss. Pet. App. 21a-24a, ¶¶ 54-58. Rongstad points to nothing that indicates a single error that would warrant this Court's review of the state court's findings.

As the court below found:

> In short, Rongstad did not raise his argument that the circuit court was required to address his motion to dismiss before it compelled discovery until after the court imposed discovery sanctions. Moreover, the argument that the constitutional dimension of the parties' discovery dispute mandated this course of action was a relatively novel one considering existing law at the time. Given all of the circumstances, the court did not erroneously exercise its discretion in compelling discovery and imposing some sanctions without first deciding Rongstad's motion.

Pet. App. 23a-24a, ¶ 58 (footnotes omitted). Thus, the Wisconsin Supreme Court did not find that Rongstad failed to "specifically" argue that his motion to dismiss must be heard before the discovery dispute was resolved as Rongstad contends. Rather, the court found that Rongstad failed to timely raise *any* argument that would allow the lower court to understand the basis for his claim of privilege that he artic-

ulated for the first time on appeal to the Wisconsin Supreme Court.[20]

B. The Wisconsin Supreme Court's holding is consistent with *Doe v. Cahill.*

Rongstad asserts that this Court should review this fact-specific case because the Wisconsin Supreme Court's opinion is not consistent with the Delaware Supreme Court's opinion in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) and other states' cases that require a defamation claim to be tested before requiring disclosure of anonymous defendants. Rongstad's claim indicates a lack of understanding of the pleading

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[20] The majority below took strong issue with the dissent's attempt to recreate the record as urged here by Rongstad:

> The dissent imparts a spin to both the facts and the law. Contrary to what it first insinuates over the course of nine paragraphs . . ., and then expressly concludes based on several more paragraphs of nuanced explanation, . . . there is no real indication in the record of Rongstad's argument until April 30, 2003, at the earliest. By suggesting otherwise, the dissent elevates the "silk purse from a sow's ear" aphorism to new levels. The dissent apparently thinks that if it underlines the words "motion to dismiss" enough times, it can summon facts from the record that do not exist. . . .
>
> Likewise, none of the legal authorities that the dissent cites (or that Rongstad cited in the circuit court) would have apprised the circuit court that Rongstad was arguing the court must address his motion to dismiss before imposing discovery and contempt sanctions. Those authorities do not address whether circuit courts should decide a pending dispositive motion in a defamation case before resolving discovery disputes. As we have indicated in the body of this opinion, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), which was decided more than two years after the circuit court denied Rongstad's motion to dismiss, appears to be one of the few cases to address such an issue.

Pet. App. 23a, ¶ 58 n.17.

requirements for defamation under the Wisconsin Statutes.[21] The *Cahill* court held that, under Delaware procedural law, a plaintiff seeking the identities of an anonymous defendant in a defamation action must first survive summary judgment to ensure that the claim has merit before compelling the defendant to lose his anonymity. The Wisconsin court agreed with the reasoning of the Delaware court, but because the pleading requirements are different in the respective states, the court determined that a hearing on the sufficiency of the pleadings in a defamation action in Wisconsin is the equivalent of the procedure adopted by the *Cahill* court. As the Wisconsin Supreme Court explained:

> In addition, the Delaware court emphasized that one of the most important aspects of testing a defamation claim by summary judgment is that the claim must be "capable of a defamatory meaning" in order to survive summary judgment. . . . This, of course, is the same inquiry that is the focus of a motion to dismiss a claim for defamation in Wisconsin. . . .
>
> Accordingly, we determine that under Wisconsin law, requiring the circuit court to decide a motion to dismiss before compelling disclosure and imposing sanctions best addresses the concerns expressed in *Cahill*. When faced with an assertion of constitutional privilege against disclosure of information identifying otherwise-anonymous organization members, the circuit court should decide a pending motion to dismiss for failure to state a claim before sanctioning the party for refusing to disclose that information.

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[21]Unlike the notice pleading requirements generally, the Wisconsin Statutes require special pleadings for defamation cases:

> In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

Wis. Stat. § 802.03(6) (2003-2004).

Pet. App. 21a, ¶¶ 51-52 (citations omitted). Notably, Rongstad is now arguing for exactly what the Wisconsin Supreme Court held: a court should decide a pending challenge to the sufficiency of the pleadings in a defamation claim before sanctioning a party for failing to produce discovery that would disclose identities of anonymous members of an association. *See* Pet. at 26, n.13; *see also* Pet. App. 21a, ¶ 52. The only issue is whether Rongstad was meaningfully denied that process in this case.

The Wisconsin Supreme Court found that Rongstad was not denied that process. The court below decided to apply its ruling prospectively only because, even if the court had applied the rule retroactively to Rongstad, the result in his case would not have changed given the trial court's finding that the postcard was capable of defamatory meaning. *See Rolo v. Goers*, 497 N.W. 2d 724, 730 (Wis. 1993) (finding that prospective application is only appropriate "when the purpose of the new ruling cannot be served by retroactivity.") The Wisconsin Supreme Court's prospective rule binds the lower courts. Petitioners' concern that the prospective rule will not be adhered to by Wisconsin courts is baseless.

C. The record below does not warrant the Court's review of the trial court's procedural rulings.

Rongstad asks the Court to find that he had a right to have his motion to dismiss heard before sanctions were issued. This question is not presented by the actual proceedings below and facts in this case. The trial court found that the mailer was capable of defamatory meaning *before* it ruled on Rongstad's motion to reconsider all of the prior sanction orders and before it ruled on the motion for a default judgment. Rongstad's failure to develop the trial court record on this matter and the trial court's denial of the motion to dismiss the defamation claim thus renders this question unworthy of the Court's review. *See, e.g., Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 n.2 (1972) ("when the

issues are not presented with the clarity needed for effective adjudication, appellate review . . . is . . .inappropriate.") (citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)). This is a simple case of missed opportunities. The unique facts in the instant case do not warrant further review. Rongstad could have, but did not, avail himself of procedures that would have avoided the alleged harm he now asserts.

II. RONGSTAD AGREED BELOW WITH THE CONSTITUTIONAL TEST APPLIED BY THE WISCONSIN SUPREME COURT AND THE COURT CORRECTLY FOUND THAT NO ASSOCIATIONAL RIGHTS WERE TRIGGERED.

A. Rongstad did not press the interpretation of *NAACP v. Alabama* and its progeny that he now urges and, consequently, that interpretation was not passed upon below.

In his petition, Rongstad claims that the courts below applied the wrong standard in determining whether the AWW members' associational rights were triggered. He argues that the court below should not have required any preliminary showing once he made a claim of privilege on behalf of his "members." In other words, Rongstad's petition to this Court faults the Wisconsin courts for applying the very cases that Rongstad asked them to apply.

In argument on the merits to the Wisconsin Supreme Court, Rongstad agreed that *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Buckley v. Valeo*, 424 U.S. 1 (1976), laid out the proper test for deciding his constitutional privilege. In his appellate brief on the merits to the court below, Rongstad explained the two-part test as follows: First, there must be evidence of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" that would adversely affect an organization's members. Wis. S.Ct. Appellants' Br. at 14 (quoting *NAACP*, 357 U.S. at

460-61) (internal quotations omitted). Second, *"[o]nce a prima facie showing has been made*, the party seeking disclosure must demonstrate that the information required to be disclosed is substantially related to a compelling government interest." *Id.* at 19 (emphasis added) (internal quotations and citation omitted).[22] Rongstad, Lassa, the trial court, and the supreme court all agreed that the proper test, as applied here, was 1) whether Rongstad met the required preliminary showing to trigger AWW's associational rights; and 2) if so, whether Lassa demonstrated a compelling interest in disclosure that outweighed the members' interest in anonymity.[23] The application of the two-part test was the only constitutional issue any party pressed upon any of the courts below. Because the Wisconsin courts were only asked to apply the two-part *NAACP/Buckley* test to the facts, that was the only test passed on by the state courts. In the courts below, Rongstad challenged the application of the test to the factual record he created; he did not raise issue with the legal standard itself.

After failing to convince the Wisconsin Supreme Court that the trial court misapplied the *NAACP/Buckley* test to the facts in the record, Rongstad changed his own position on the law. In his motion for reconsideration to the Wisconsin Supreme Court, Rongstad asserted the interpretation now urged in the petition for certiorari—that is, that there is no preliminary

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[22] *See also* Wis. S.Ct. App. Br. at 13 ("Thus, *where evidence suggests* that compelled disclosure could chill political association because of fear of hostility or economic reprisal, the government must demonstrating [sic] a 'compelling' interest in obtaining the information.") (citing *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (emphasis added). Contrary to the assertion of the Petitioners, this was not the alternative argument pressed below (Pet. at 21 n.5); rather it was the *only* interpretation argued below.

[23] Only the dissent found that this is not the proper test (Pet. App. 63a, ¶ 158 (Prosser, J., dissenting)); the concurrence did not reach this issue (Pet. App. 43a, ¶ 93 (Butler, J., concurring)).

showing required—for the first time. Contradicting his own argument on appeal, Rongstad argued in his motion for reconsideration that the majority opinion below failed to follow established constitutional law by applying the two-step test and requiring him to make a preliminary showing of harm. The Wisconsin Supreme Court denied his motion for reconsideration without analysis or comment. Thus, question of whether there must be a preliminary showing was never passed upon by the state court. Rongstad's late attempt to refashion his argument after losing on appeal does not warrant this Court's review. *See Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (refusing to exercise appellate jurisdiction over constitutional claims that were not preserved pursuant state law rules of procedure). While a federal question was raised in the courts below, it was not the one that Rongstad now urges the Court to decide.

Because the question of *whether* a preliminary showing must be made under *NAACP* and its progeny was not pressed upon or passed on by the courts below, certiorari is not warranted. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("it is also the settled practice of this Court, in the exercise of appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below."); *see also Envtl. Defense v. Duke Energy Corp.*, 75 U.S.L.W. 4167, ___; No. 05-848, slip op. at 17 (U.S. Apr. 2, 2007) (Apr. 2, 2007) (noting issues not analyzed by court below are procedurally foreclosed).

B. The Wisconsin Supreme Court correctly applied *NAACP v. Alabama* and *Buckley v. Valeo*.

As in his motion for reconsideration, but contrary to all of his prior arguments below, Rongstad argues to this Court that

the state court applied the wrong constitutional standard by requiring him to make *some* showing that disclosure of AWW "members'" identities would potentially cause a chilling effect on their associational rights, before determining whether Lassa demonstrated a compelling governmental interest that would justify compelled disclosure of those members. He now argues, based on interpretations of *NAACP* and *Buckley* from the California Supreme Court and other federal and state courts, that no preliminary showing is required; rather, the person seeking disclosure has the first burden. *See* Pet. at 14-16.

Yet, all of the courts cited by Rongstad agree that there must be an "association" on which to attach the freedom of association protected under the First Amendment. *See Dallas v. Stanglin*, 490 U.S. 19, 23 (1989) (holding that a finding of a constitutionally protected association is a necessary precondition for applying First Amendment protection of the "compelling interest" and "least restrictive means" tests). The fact of an association is the a priori condition for a protected right of private association. The trial court record is unclear whether the AWW even has members for which to attach associational rights. The articles of incorporation of the organization state that it "shall have no members," indicating that the "association" is a sham. In fact, the more reasonable interpretation of Rongstad's testimony is that Rongstad declared all those involved with the mailer "members" only after the complaint was filed, and with the sole intent to protect his political-attack business.

Further, even if Rongstad had shown that the AWW was an actual association with members, the record does not demonstrate any reason to presume a chilling effect upon those members. As the Wisconsin Supreme Court found:

> Rongstad's affidavit is insufficient to establish the required preliminary showing under *NAACP* and its progeny. The affidavit provides no evidence of particular

> instances of past or present threats, harassment, or reprisals. *See Buckley*, 424 U.S. at 74; *NAACP*, 357 U.S. at 462. It also does not indicate a pattern of threats or specific manifestations of public hostility against the Alliance or similar groups.
>
> *Although a record of past harassment or reprisals is not always necessary, Rongstad has not otherwise established a reasonable probability of such chilling effects.* At most, he established precisely what is ordinarily deemed insufficient: a general statement of subjective fear of reprisal without any basis in objective, particularized facts. Only one of the five statements in his affidavit is directly related to the substance of the required showing, and that statement establishes only that some unspecified number of members have told him they will no longer be interested in participating in the [AWW] or other organizations like it based on general fears of reprisal.

Pet. App. 27a-28a, ¶¶ 67-68 (emphasis added) (referring to Rongstad's affidavit, reproduced as Respondent's Appendix F).

The record is devoid of any evidence of risk of harm, reprisals, or harassment. Moreover, given the conflicting evidence on whether there is an association from which to attach rights, the record does not support a presumption of a chilling effect. The proceedings below do not warrant a review of constitutional principles by the Court. *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (dismissing writ of certiorari as improvidently granted "in view of ambiguities in the record as to the issues sought to be tendered").

This matter has been resolved on its merits. The trial court entered a judgment, in accordance with the parties' settlement agreement, that dismissed with prejudice the defamation cause of action against Rongstad and allowed Rongstad to appeal the appropriateness of the discovery sanctions awarded against him. R. 141:2. The only constitutional issue

is intertwined with state law on discovery sanctions. Moreover, because the action is dismissed with prejudice, there will be no additional discovery and this Court's decision has no impact on the associational rights of a single AWW "member." What is left at issue for appeal is whether the stipulated amount of discovery sanctions against Rongstad was reasonable. Because no constitutional rights of those unnamed defendants are implicated or threatened, this case is not an appropriate vehicle to review any conflict in authority.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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April 11, 2007

APPENDIX

AVAILABLE
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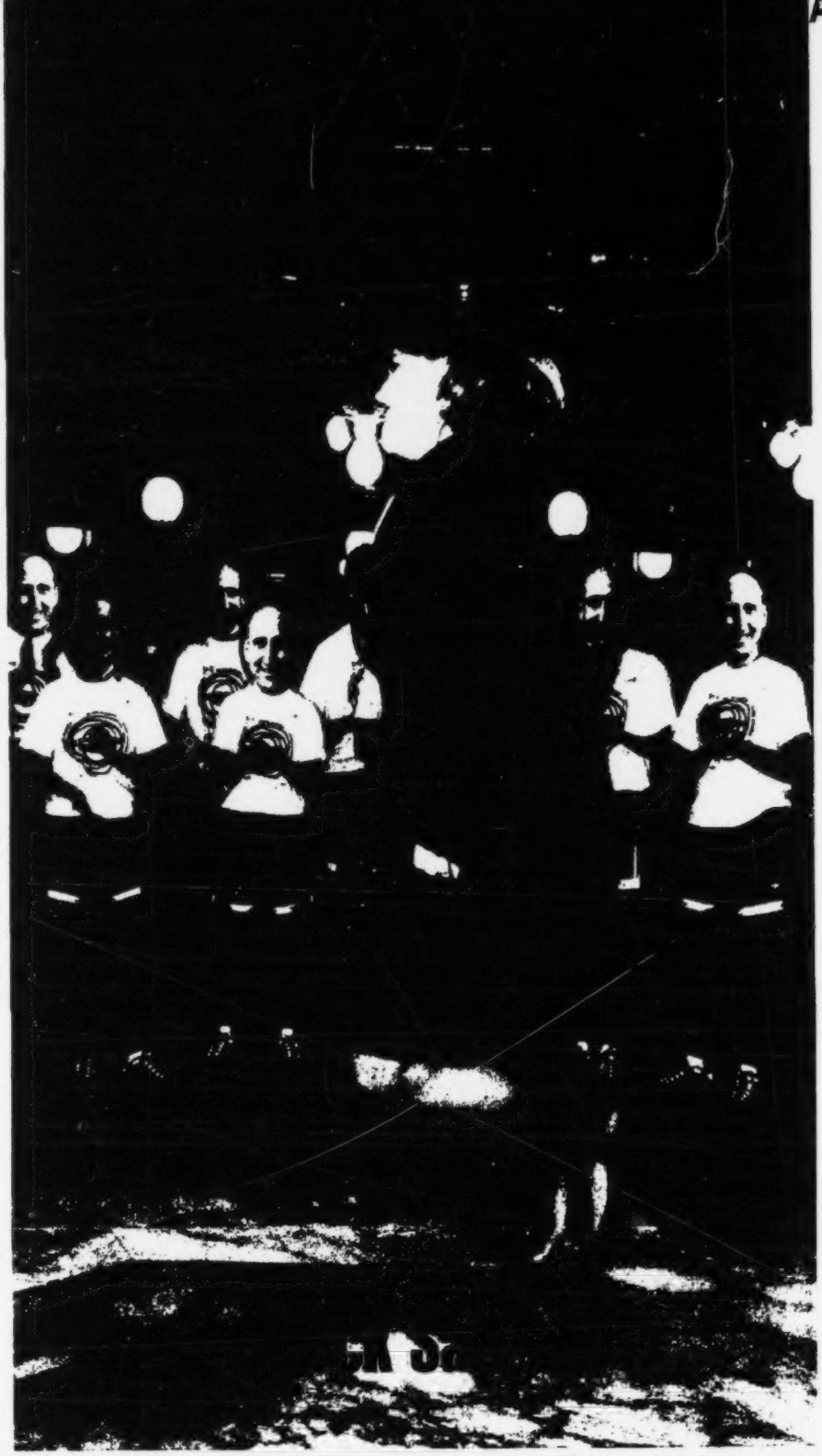
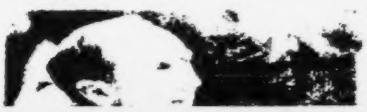


State senator faces 20 felony counts, up to 85 years in prison

Chvala charged with extortion

Jensen, other GOP
wardsers expected
be charged today



A public service announcement from the Alliance for a Working Wisconsin

2a

APPENDIX B

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY

No. 03-CV-177
Volume II

JULIE M. LASSA,
Plaintiff,

v.

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES, 1-5, in their individual capacities,
Defendants.

DEPOSITION of TODD JAMES RONGSTAD, was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, Jessica Wendorff, Registered Professional. Reporter ands Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Madison Wisconsin, on the 4th day of February 2003, commencing at 11:15 o'clock in the forenoon.

* * * *

[78] A Not that I'm aware.

Q And if anyone would be aware of it the founder and board—

A Like I said, I'll have to take a look at the paperwork again.

Q At this point you don't know of any?

A No.

Q And you don't have any idea how many people you have designated as a member?

A I do. I just don't want to misspeak by giving you an incorrect number.

Q Are we talking five? More than five or fewer than five?

A More than five.

Q Fewer than 10 or more than 10?

A More than 10.

Q How many roughly?

A I'd have to go back and look at that.

Q Is there a membership fee?

A No.

Q So it's just someone that—I'm just trying to understand this.

A Supporters of the organization.

Q Let's say I want to be your supporter and I say I'd like to be a supporter of the Alliance for [79] a Working Wisconsin. You say fine, you're in?

A Correct, correct.

Q So I could be a communist, a fascist, a Nazi? It doesn't matter?

A If I thought you were sincere and were a legitimate supporter of the organization. But if I didn't think you were sincere or a legitimate supporter of the organization, you wouldn't be a member.

Q You would make that decision?

A Well, we would make that decision together.

Q Suppose I disagreed, could I appeal it to someone?

A I don't think we have any provisions for that, no. It's never been an issue.

Q There are no dues at such?

A No.

Q Let's go back to the Exhibit 16. I don't know why I can never find this thing.

A Here's another.

Q Thank you. With whom did you discuss this mailer?

A A number of different individuals.

Q Let's name them.

MR CROOKS: To the extent this goes [80] to the constitutional issues raised previously, I'll object.

MR. GARVEY: But—go ahead and finish the statement. I didn't hear it.

MR. CROOKS: He can answer if he chooses.

THE WITNESS: My best recollection is that I discussed it with a few members. I discussed it with a few friends, sort of in the initial exploratory phase, research kinds of issues. And that's about the extent of it.

BY MR. GARVEY:

Q Well, who were they?

MR CROOKS: Same objection, same instruction.

THE WITNESS: The people that I talked to that aren't members that I recall and there may have been more would be Heather Smith, Lindsay Hoglund, Susie Schooff, and Scott Tyre. And I believe Mark Jefferson.

MR. GARVEY: Could you read back those names for us, please.

(Answer was read back.)

BY MR. GARVEY:

Q And you're saying these are nonmembers?

[81] A Correct.

Q Let's take Scott Tyre. Who is Scott Tyre?

A He's a lobbyist for Foley & Lardner.

Q What did you discuss with Scott Tyre?

A I don't remember specifics of any of these conversations, but I believe that I did communicate with them about the Alliance was considering doing an anticorruption communication of this kind, and I mean I can't tell you exactly what any of those conversations were.

* * * *

BY MR. GARVEY:

Q What other people did you discuss this race [95] with, this project?

A As I said, these are the nonmembers I recall. There were a couple members I discussed it with.

Q Who were they?

A I did not—that was sort of a preliminary kind of thing as I—my first step in doing anything here. I didn't discuss it with anybody else.

Q But you discussed it with two people you call "members." Who were they, and what did you discuss?

MR. CROOKS: Same objections.

THE WITNESS: They weren't involved in the production of this piece, so I am not giving you my membership list.

BY MR. GARVEY:

Q What I'm asking you for is, you've identified two people unnamed who you discussed the idea of producing or getting involved in the Lassa matter. And you won't tell us who they are.

A It didn't have anything to do with the production of this piece. That was all something that I did through the Alliance for a Working Wisconsin and had sole authority for [96] and did not discuss with anybody else.

Q Maybe we can save some time here because—who authorized you to produce this?

A I did. I'm the executive officer of Alliance for a Working Wisconsin.

Q And who paid you to do it?

A The Alliance for a Working Wisconsin.

Q Where did they get the money?

A Out of Alliance funds and contributions.

Q Who made those contributions?

MR. CROOKS: Same objection.

* * * *

THE WITNESS: Lots of different people.

BY MR. GARVEY:

Q You got this postcard, this photograph the 28th of the October?

A Uh-huh.

Q In four days this was in the hands of voters in Ms. Lassa's district?

A Yeah.

Q How much did it cost to produce this piece?

MR. CROOKS: Objection, asked and answered yesterday.

THE WITNESS: As I said yesterday, I think approximately with mailing, postage, [97] printing, all that kind of stuff, roughly around $3,500.

BY MR. GARVEY:

Q Did you get a fee in addition to that?

A The Valkyrie Group did, yes.

Q What was that fee?

A $3,000.

Q So the total was $6,500?

A I guess, yeah, that's roughly correct.

Q How much does it cost to mail each one of these?

A It's roughly 35 cents or something like that.

Q And you mailed 10,000 of them?

A As I said, roughly in that range. I don't have the exact figures for you. That's my rough estimate.

Q If I give you a list of names and ask did you discuss either the possible open seat or producing or getting involved in the Lassa project, are you going to answer that, those questions?

A Well, I've—

Q Yesterday you wouldn't, so I'm asking you today.

A I've answered every nonmember, and as I said, [98] since there's no reason, I am not going to name members that

I may have discussed this with. They were not involved in the production of this piece.

MR. GARVEY: Let's go off the record.

(Discussion off the record.)

BY MR. GARVEY:

Q Mr. Rongstad, would you identify all persons involved in the preparation, funding, or distribution of the postcard at issue and pertaining to their conduct in this regard?

MR. CROOKS: Let me just object to asked and answered. Subject to that, you can answer.

THE WITNESS: I was the sole person responsible for handling all those things. I had contractors that assisted me with printing, mail processing, and some graphic design. But I was the person responsible, not consulting with anybody else about all of those matters.

BY MR. GARVEY:

Q With whom did you discuss getting involved in the Lassa matter?

A As I said, a number of people who aren't members who I already named and a couple of [99] people who are members who I am not going to name.

Q Why aren't you going to name them?

A Because it has no relevance to this issue and what the Court's order is. I'm answering the questions. I was the one solely responsible. None of my members saw this in advance of this going out. They didn't discuss it in with me in advance of it going it. None of my members had any idea of what the subject was of the piece. I was solely responsible. My organization paid for it and I managed the whole processing of—

Q Who did see it before it went out?

A I would assume just my graphic designer and when it went to the printer and the mail house. Nobody else.

Q Did anyone make a review of the language on this?

A No.

Q How about the picture of Chuck Chvala on the second side?

A Not other than what I described to you earlier regarding the graphic designer assisting me with finishing the project.

[100] Q What I'm trying to get to is this, somehow you made a decision to get involve in the. Lassa matter, whether it was your. Assembly race or the Senate race. With whom did you discuss that question?

MR. CROOKS: Same objections.

THE WITNESS: I've already answered it.

BY MR. GARVEY:

Q Are you not going to answer it?

A I've already answered it. It was solely my decision.

Q To get involved in this race, you didn't discuss it with anyone other than those people?

A It was solely my decision to do it, yes.

Q And you funded it—

A Through my organization, the Alliance for a Working Wisconsin, yes, I did.

Q And you made the decision without checking with anyone?

A Absolutely.

Q You didn't check with your other board member?

A I didn't check with my other board member. I didn't check with my members. I made the decision myself.

[101] Q Who contributed towards this specific project?

A There have never been any earmarking of any contribution for my organization for any activity period.

Q So if I go down a list of names, did you discuss the Lassa race or the open seat, what is your testimony going to be? I think we can save ourselves some time here.

A I have told you all people that I recall discussing it with, other than a couple of members. So if you want to go through a list of names trying to identify my members, I am not going to tell you.

MR. GARVEY: Let's just take a break.

(Recess was taken.)

BY MR. GARVEY:

Q Will you identify all the people with whom you discussed the subject of this mailer before it was mailed?

MR. CROOKS: Objection, asked and answered.

THE WITNESS: Nobody other than myself. I didn't discuss the subject with anybody.

BY MR. GARVEY:

* * * *

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY

Case No. 03-CV-177
Case Code: 30106
Volume III

JULIE M. LASSA,

Plaintiff,

v.

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES, 1-5, in their individual capacities,

Defendants.

DEPOSITION of TODD JAMES RONGSTAD, was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, JESSICA WENDORFF, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Suite 101, Madison Wisconsin, on the 5th day of February 2003, commencing at 10:15 o'clock in the forenoon.

* * * *

[18] appreciated.

BY MR. GARVEY:

Q You testified that no dues are required. And you testified that you do not have a specific set up criteria for determining a member; would that be a fair statement?

A Correct. Although, as I described yesterday and will answer once again, supporters of the organization are often considered as members of the organization.

MR. CROOKS: Finish your answer, and I'll explain to you something and maybe will speed this up.

THE WITNESS: And, you know, that's the process of determining who's going to be a member is up to the officials of the organization.

MR. GARVEY: Mr. Crooks.

MR. CROOKS: Thank you. The document we brought with us today, that you admitted have not had an opportunity to review, does go into those issues, which is why we brought it.

MR. GARVEY: Well, perhaps you could be of assistance by pointing.

MR. CROOKS: I will do so. Todd, [19] maybe you can help me.

MR. GARVEY: Let me just mark this. This is a Form 1024 application for exemptions from taxes for the Alliance for a Working Wisconsin.

MR. CROOKS: Addendum D.

(Exhibit No. 40 marked for identification.)

BY MR. GARVEY:

Q Mr. Rongstad, I'm handing you what your counsel gave me as your application for tax exemption for the Alliance marked as Exhibit 40?

A That's correct.

Q Your counsel indicated Addendum D may be of some assistance to us. Would you explain what—

A It's related to sources of financial support. Sources include individuals, organization, and businesses that share

the Alliance's views and interests in the public policy issues affecting Wisconsin residents. The Alliance may also seek grants. Contributors may eventually be members of the Alliance and eventually receive newsletter communications and regular updates about organizational activities.

[20] Q. Why do you think this is responsive to the question of how your members find out about information?

A I didn't think it was.

MR. CROOKS: I thought the issue was how people go about becoming members.

BY MR. GARVEY:

Q Mr. Rongstad, is there something in the bylaws of this organization or in the filing for nonprofit status that defines membership?

A This relates to how people can be members. Supporting the organization, that's how they can become members.

Q Such as contributors—

A In addition to something else I'm looking for here.

Q Let me ask you about that. Contributors may, eventually be members?

A Correct.

Q It does not say will. It just says may.

A Correct.

Q In your articles you say there shall be no members, Article 6. How do you explain that?

A It doesn't say there shall be no members. It says there aren't at the beginning.

[21] Q Showing you the same exhibit, if you look at Article 6, no members, the corporation shall have no members?

A Yeah, that was an initial organizational.

Q Does it say this is just an initial organizational matter or—have you amended this?

A No, not officially but we have by discussion.

Q And discussion with whom?

A With the other board members.

Q So the three of you who previously have been identified—

A Correct.

Q —have done this without notifying Internal Revenue Service or no one else?

A That is correct.

Q So that the internal inconsistency here has been rectified?

MR. CROOKS: Well, let me object as argumentative. Subject to the objection, you can answer.

THE WITNESS: What was the question?

MR. CROOKS: Do you want to just read it back?

(Question was read back.)

[22] THE WITNESS: I'm looking for something else as well.

BY MR. GARVEY:

Q Do you have a document that shows it has been?

A No, that was through one of our verbal meetings.

Q When did that take place?

A I can't give you the exact date, early on in the organization.

Q Can you give me the year?

A I believe 2000.

Q And then how did you, when you cleared this up, define member?

MR. CROOKS: I'll object just to the extent it's been asked and answered. Subject to that, you can answer.

(Discussion off the record.)

BY MR. GARVEY:

Q You said you have clarified and changed the bylaws so now you permit members. Did you adopt the definition in Addendum D that your counsel pointed to?

A No. If you could just give me a second, I'm looking for something else relative to your earlier question. Page 2 of Part I, Item 8 [23] says, The board of directors hereby gives the president the power to conduct, manage, direct—

MR. CROOKS: Go slow so the reporter can get it.

MR. GARVEY: I can't find this. Can you help me out?

MR. CROOKS: Page 2, Part 1, Item 8.

THE WITNESS: Page 2.

MR. CROOKS: Article 4, second paragraph, The board of directors hereby gives the president the power to conduct, manage, direct, and control the affairs of the corporation, to negotiate and enter into contracts, and do all necessary acts and things necessary or expedient in carrying out the purposes of the corporation.

BY MR. GARVEY:

Q Could you tell us why—

A Those responsibilities in connection to the additional language on page 2—well, on Part 2, Item 1, page 2, Future contemplated activities include: Direct communication via Internet, e-mail, establishing local groups of volunteers to further the Alliance's message.

[24] Q We're actually trying to get this down. Slow down. Could you now tell me which paragraph you're starting to read?

A First paragraph starting with future. Future contemplating activities include: Direct communication via Internet, e-mail, establishing local groups of volunteers to further the Alliance's message, possible memberships, Internet website, and sponsoring public debates. The possible memberships is something that I, as the president of the organization, in consultation with the other board members, went ahead with.

Q Let me just ask you this question. Have you established direct communication by Internet and e-mail with people you call members?

A Yes.

Q And do you have those available?

A I am not going to give you communications that have the names of my members.

Q Have you established local groups of volunteers?

A No.

Q No. 3, possible memberships, that could be memberships in other organizations or it could [25] be members?

A No, this relates to the Alliance for a Working Wisconsin.

Q Did you draft this document?

A No.

Q Who did?

A My attorney.

Q Who's your attorney?

A Jeff Bartzen.

Q And so it's your testimony that possible memberships does not mean memberships in other organizations?

A That's correct.

Q It means there might be members despite the statement that there will be no members?

A No, it means that's one of the things that we're, you know, planning for the future of the organization.

Q Is there an Internet website for the organization?

A We have one reserved. It hasn't been put up yet, but we have the address reserved.

Q Have you sponsored public debates?

A Yes.

Q And where and when?

* * * *

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
Branch 13

Case No. 03-CV-177

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 29th day of January, 2003, commencing at 11:30 o'clock a.m.

PRESIDING:

HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendant Todd Rongstad, The Valkyrie Group and Does 1-5.

* * * *

[3] discovery and get my client in a deposition setting so that he can ask him questions that are somehow going to be determinative of whether his client runs for State Senate, that's not a legitimate purpose for filing a lawsuit.

There are principles of absolute immunity that are applicable in a defamation suit involving a public official. The Court is probably familiar with the case of S*ullivan v. The New York Times*. There are also issues of advocacy that come into play, and we intend to file a motion to dismiss the entire lawsuit within a week to 10 days.

And to subject him to the deposition process under the guise of a legitimate lawsuit is not right, number one. Number two, I'm not available and he's not available, so those are the bases for the motion, and the rest of it is set forth in the pleadings and the papers that have been filed with the Court.

THE COURT: Mr. Garvey?

MR. GARVEY: Your Honor, this suit was filed on the 16th of January. The defendant was quoted in the papers the next day on the 17th with respect to the suit. We diligently tried to serve him. We finally did on the 22nd.

Mr. Crooks suggests a number of things, but he

* * * *

[7] doing so on the basis of conflicts, one would assume that you would bring your calendar along so that we'd be able to determine what the dates are when there are not conflicts.

MR. CROOKS: Judge, if I may speak to that, I originally had thought this was by telephone and was going to have Mr. Rongstad on the line, so I rushed over here at the last minute, didn't grab my calendar and don't have Mr. Rongstad,

obviously, on the line because nobody appeared by phone. But I would be happy to sit down with counsel when I leave here and pick a mutually convenient date.

THE COURT: Well, you're asking me today to quash a subpoena for a specific date, and what I'm' willing to do is only this. I will quash that on the condition that you by the end of the day today provide an alternative date Friday, August—I'm sorry, Friday, January 31st for this deposition to go forward.

If you or your client cannot come up with a better date on the 31st than the date it's presently scheduled, then it will simply proceed on the 30th, and your client and yourself will have to make the necessary accommodations to be available at that time. I would have hoped we could have come up with [8] the specific date right now, but obviously that's not going to be possible.

I will make this point with respect to some of the contentions that you've raised. There is no basis under the law to say that simply because someone has only recently been served and represents that they intend to file a motion to dismiss the case that they are therefore immune from or not subject to having their deposition taken. That simply is not a principle of law that applies.

Now, there may be extenuating circumstances. There may be a situation where subjecting somebody to a deposition in fact involves the kind of burden and inconvenience and oppression that would justify a stay to allow the motion to dismiss to be decided and then allow the deposition to go forward, if in fact the case is going to go forward. No showing has been made that this is such a case.

The other thing that is apparent from the pleadings and the rather sparse information that's in the file is that there are other defendants who have not been served, have not been named and have only been identified as Does that Mr. Garvey

and his client are entitled to try and find out who they are so as to properly join them and; in turn, allow their [9] circumstances to be considered ultimately in this lawsuit and in the questions of immunity that you allude to. So maybe the exception to the immunity provided under the *Sullivan* case might be applicable to your client, maybe not. But it wouldn't be applicable perhaps, and the facts may reveal that it wouldn't be applicable to some of these other people.

While your client is properly joined, is under the jurisdiction of the court, there's no reason why he should not answer questions at a deposition that would allow Mr. Garvey to identify who these other defendants are. He's operating under a statutory obligation to join them within a certain period of time, and I haven't been given any good reason why there should be any delay in that.

Finally, I read Mr. Garvey's letter in which he alludes to the political nature of the case, and obviously, what this is all about as the Complaint reveals is a mailing that was done in the context of a political campaign, but I don't read the letter as suggesting that Mr. Garvey and his client have filed the lawsuit solely for political reasons or solely as a basis to try to do something that will allow his client to make a decision about whether she's going to run for this Senate seat.

[10] I think he alludes to the fact that she's considering running for a Senate seat, which I think since the letter was written now is clearly an open seat since I think the incumbent's appointment to a different position was confirmed yesterday. I take judicial notice of that from the newspapers. But I don't see it necessarily as a case that involves an improper motive that would suggest that there simply is no merit to it.

For all of those reasons and for the reason that Ms. Lassa has also requested ultimately injunctive relief in this case which is aimed at clearing her name, clearing her name is a

quite legitimate purpose of a defamation case and that seems explicitly to be one of the purposes that she's seeking to accomplish by virtue of this litigation, and further delay to the extent she chooses to run for this seat will exacerbate the impact, whatever it may be, of the mailing that apparently or allegedly was generated from your client.

So for all of those reasons, I simply am not persuaded that there's any reason to delay, certainly not to delay as was suggested until a motion to dismiss was filed and briefed and decided. And as a practical matter now, there's no information that I [11] have that would suggest a reason to delay beyond giving you the consideration of rescheduling this to a better date on Friday, or better time on Friday than is presently set for it, or perhaps a better time on Thursday. I don't know how long your trip to Mauston is going to take, and maybe you can schedule this late in the afternoon on Thursday and that may be able to accommodate everybody's schedule.

So the motion will be granted in that conditional fashion, and we'll simply leave it for you folks to come up with an alternative time, if that's possible, on Friday. If it's not, then it will go forward on the time it's presently scheduled, but I do want to emphasize to Mr. Garvey that any time that Mr. Crooks and his client can offer to be available on Friday would be considered an acceptable time, so I'm not giving you the ability to veto. If they say, "Well, we could be there at 8 o'clock in the morning on Friday," and you say, "Well, I don't like to get to the office till 10:00," that's not going to work.

* * * *

APPENDIX E

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
Branch 13

Case No. 03-CV-177

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC. and
DOES 1-5, In Their Individual Capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 4th day of February, 2003, commencing at 9:30 o'clock a.m.

PRESIDING:

HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:

EDWARD R. GARVEY, GLENN M. STODDARD and PAMELA R. McGILLIVRAY, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin, appeared telephonically on behalf of the plaintiff;

MICHAEL P. CROOKS, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared telephonically on behalf of the de-

fendants Todd Rongstad, The Valkyrie Group and Does 1-5;

ERIC M. McLEOD, Michael Best & Friedrich, LLP, Attorneys at Law, One South Pinckney Street, Madison, Wisconsin, appeared telephonically on behalf of the defendant A.M. Mailing Service, Inc.

* * * *

[16] discover who was involved. And as we don't care who members are, we care who was involved in ordering this, paying for it, mailing it, designing it and all the rest of it.

THE COURT: All right. The request for a stay to permit appeal or to permit a petition for supervisory writ will be denied.

The defendant Mr. Rongstad has made no showing of any likelihood of success. It appears to me after consulting the very cases that he cites, that those cases stand for propositions that are contrary to the basis for the objection that was lodged to these questions.

The suggestion that he and his counsel have been denied the opportunity to make presentation on the two issues that were alluded to by Mr. Crooks is simply unfair, is an unfair characterization of what transpired between last evening when I was unexpectedly confronted with this issue and this moment.

Mr. Crooks obviously had at his disposal a series of cases, which he concedes he had consulted prior to the deposition. As a result, he was as familiar or should have been as familiar with the standards that the Supreme Court has laid out for [17] when the constitutional principles identified in cases such as *NAACP v Alabama* could be utilized to prevent what is otherwise a perfectly relevant and legitimate question at a deposition or any of the things that were at issue in those Supreme Court cases. No argument was made to suggest anything about harm or threats, or reprisals or chilling effect

of the disclosure or what the disclosure would have on Mr. Rongstad or on his cohorts or other members of his organization.

Indeed, we were not in a setting in which evidence was being taken and where I was making an evidentiary ruling, and Mr. Crooks and his client should not be slighted for failing to have presented evidence, but there was no assertion made. There was no argument made that anything of the sort identified as the kind of harm or threat that would implicate these constitutional principles was at stake here or was something that reasonably could have been shown if an evidentiary proceeding were to have been conducted.

Instead, what I was asked is to submit a brief, not to submit affidavits but to submit a brief. And the fact that I declined the invitation to receive briefs was in part a reflection of the fact that Mr. [18] Rongstad was going to be there this morning. It struck me that it would be valuable to try to, if it was possible, resolve this issue in a way that would be most efficient for Mr. Rongstad and for the attorneys involved in the deposition.

In addition, and this is a further reason why the stay will be granted—

MR. GARVEY: Denied you mean?

THE COURT: —I not only have to consider the question of the likelihood of success on the merits by the plaintiff, I have to also in the mix consider the harm that granting a stay would visit on the party opposing it. And here, the record that has been presented, not simply in the context of these proceedings but also in the context of a motion for a protective order that was sought and partially granted last week, is that the plaintiff when the allegedly libelous mailing was done was a candidate for public office and apparently was successful in winning an election that was the regular election held in November of last year.

The harm that she experienced certainly could not have been remedied in any way that would have any bearing whatsoever on her election of last fall. As a result, the urgency of her immediately filing a [19] lawsuit such as the one she has now filed was, as a practical matter, simply not there.

The affidavit that was submitted in reference to the motion for the protective order reveals she apparently is now considering running in a special election that in November of last year she would not have known was even going to take place, and it was only when a vacancy was created in I guess early January that that reality even became something worthy of her consideration.

Without commenting on the merits of her allegations that this mailing was in fact defamatory or that it was prompted by express malice, if she is going to seek to clear her name as best she is able in a manner that would have any value to her aspirations to seek the position where that opening has occurred, then it's crucial that that occur at some point prior to the point when that special election is held, and I don't know for sure when that will be. But in any event, delay would clearly be harmful to her legitimate interest in seeking to correct the harm done by the mailing that she alleges.

Now, a moment ago I may have misspoke and said this was an additional reason that the stay would be

* * * *

APPENDIX F

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
BRANCH 13

Case No. 03-CV-0177
Code No. 30106
INTENTIONAL TORT

JULIE M. LASSA
1900 Clark Street
Stevens Point, WI 54481,

Plaintiff,

v.

TODD RONGSTAD, as president of VALKYERIE GROUP, LLC.
and as president of Alliance for a Working Wisconsin
108 W. 3rd St.
Waunakee, WI 53597,

THE VALKYRIE GROUP, LLC
108 W. 3rd St.
Waunakee, WI 53597,

A.M. MAILING SERVICES, INC.
100 Interstate Blvd.
Edgerton, WI 53534-9399,

and

DOES, 1-5, in their individual capacities,

Defendants.

AFFIDAVIT OF TODD RONGSTAD

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

TODD RONGSTAD, being first duly sworn under oath, deposes and states as follows:

1. That I am a board member and president of the Alliance for Working Wisconsin.

2. That in that position, I had numerous conversations with members of the association over the last several years and recently specifically related to the lawsuit at issue.

3. That as a board member and president of the association, I and the Alliance have previously guaranteed confidentiality with respect to the identity of members and have honored that throughout the course of my work with the Alliance.

4. That members have told me that if I am compelled to disclose the identity of members of the organization, that they will no longer be interested in participating in the organization or any such organization, for fear of public reprisal and potential legal action.

5. That disclosure of the names and the attendant loss of confidentiality will likely ruin my business and force me to find a new career.

Dated at Madison, Wisconsin this 5th day of February, 2003.

/s/ Todd Rongstad
TODD RONGSTAD

Subscribed to and sworn before me
this 5th day of February, 2003.

/s/ Michael P. Crooks
Notary Public, State of Wisconsin
My Commission expires: permanent

APPENDIX G

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 03-CV-177
Case Code: 30106
Volume IV

JULIE M. LASSA,

Plaintiff,

v.

TODD RONGSTAD, THE VALKYRIE GROUP, LLC,
A.M. MAILING SERVICES, INC., and
DOES, 1-5, in their individual capacities,

Defendants.

DEPOSITION of TODD JAMES RONGSTAD, was taken under and pursuant to the provisions of Section 804.05 of the Wisconsin Statutes, and the acts amendatory thereof and supplementary thereto, before me, BRANDE WILSON, a Notary Public in and for the State of Wisconsin, at the law offices of Garvey & Stoddard, S.C., 634 West Main Street, Madison, Wisconsin, on the 11th day of February 2003, commencing at 8:12 o'clock in the forenoon.

* * * *

[33] Q And do you have any arrangements with any mailing house that they would pay you a percentage of the money?

A No.

Q You swore in your affidavit to the court that you, quote, "guaranteed confidentiality," unquote, and last week we asked you if you had a copy of that guarantee and have you had an opportunity to check your files?

A As I answered before, it's on the brochure for the Alliance for a Working Wisconsin.

Q There's nothing else other than the brochure that guaranteed the confidentiality?

A It's very explicit and that's something that anybody who would have contributed to the organization would have seen.

Q And does the brochure guarantee confidentiality with respect to the identity of members?

A Yes.

Q And their contributions?

A Yes, all supporters.

Q And you honor that throughout the course of your work at the Alliance?

A Yes.

[34] Q You indicated in your sworn affidavit that some members have contacted you concerning litigation, or potential litigation?

A I don't know if I said contacted. I've certainly had discussions with members about it.

Q Well, you swore that you would not release the names in part because of potential legal action against members; is that correct?

A Correct.

Q And has any member contacted you about this lawsuit?

A No.

Q And has any member contacted you about litigation in general?

A. No.

Q Are you being—is the Alliance for a Working Wisconsin, is it involved in any litigation other than this case?

A No.

Q Is The Valkyrie Group involved in any litigation?

A No.

Q Are you personally other than under the domestic matter that we discussed last time?

* * * *

APPENDIX H

[LOGO]

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
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DISTRICT IV

March 4, 2003

To:

Edward R. Garvey
Garvey & Stoddard, S.C.
634 W. Main St., Ste. 101
Madison, WI 53703

Jon G. Furlow
Eric M. McLeod
Michael Best & Friedrich
P.O. Box 1806
Madison, WI 53701-1806

Michael P. Crooks
Peterson, Johnson & Murray, S.C.
131 West Wilson St. #200
Madison, WI 53703-2866

You are hereby notified that the Court has entered the following order:

03-0309-LV Julie M. Lassa v. Todd Rongstad, Valkyrie Group, LLC, A.M. Mailing Services, Inc., and Does 1-5

Before Vergeront P.J., Dykman and Roggensack, J.J.

On February 24, 2003, we denied Todd Rongstad's request for a stay pending disposition of his petition for leave to appeal. The time for Rongstad to submit argument on the merits of the petition for leave itself and the time for filing a

response has now elapsed without any filings by either party. Because it appears that Rongstad no longer wishes to seek interlocutory review of the circuit court's order,

IT IS ORDERED that the petition for leave to appeal is denied.

Cornelia G. Clark
Clerk of Court of Appeals

APPENDIX I

[LOGO]

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DISTRICT IV

April 1, 2003.

To:

Hon. Michael N. Nowakowski
City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3343

David J. Pliner
Corneille Law Group, LLC
700 Regent St., Ste. 201
Madison, WI 53715-2634

Judith A. Coleman, Circuit
Court Clerk
City-County Bldg., Rm. GR-10
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3341

Michael P. Crooks
Peterson, Johnson & Murray, S.C.
131 West Wilson St. #200
Madison, WI 53703-2866

Edward R. Garvey
Garvey & Stoddard, S.C.
634 W. Main St., Ste. 101
Madison, WI 53703

Eric M. McLeod
Jon G. Furlow
Michael, Best & Friedrich
P.O. Box 1806
Madison, WI 53701-1806

You are hereby notified that the Court has entered the following opinion and order:

03-0742-LV Julie Lassa v. Todd Rongstad, et al. (L.C. # 03 CV 177)

Before Dykman, Roggensack and Lundsten, JJ.

Todd Rongstad has filed a petition for leave to appeal and motion for temporary relief. He seeks review of two oral orders of the circuit court dated February 28 and March 11,

2003.[1] A petition for leave to appeal may only be taken from a judgment or order "entered" in the circuit court. WIS. STAT. RULE 809.50(1) (2001-02).[2] A judgment or order is "entered" when it is reduced to writing and filed with the clerk of the circuit court. *See* WIS. STAT. RULE 806.06(1) and 807.11. Leave to appeal may not be taken from oral orders of the circuit court.

Even if the orders had been reduced to writing, we would deny the petition for leave to appeal. We will only grant leave to appeal if the petitioner shows that immediate review by this court will: (1) materially advance the termination of the litigation or clarify further proceedings in the litigation; (2) protect the petitioner from substantial or irreparable injury; or (3) clarify an issue of general importance in the administration of justice. *See* WIS. STAT. § 808.03(2). Rongstad has not met these criteria.

Julie Lassa has moved for attorney's fees and costs. Because we cannot conclude that the petition has no reasonable basis in law or equity, we deny the motion. *See* WIS. STAT. RULE 809.25(3).

Upon the foregoing,

IT IS ORDERED that the motion for temporary relief is denied.

IT IS FURTHER ORDERED that the petition for leave to appeal is denied.

IT IS FURTHER ORDERED that the motion for attorney's fees and costs is denied.

Cornelia G. Clark
Clerk of Court of Appeals

---

[1] The circuit court entered a written order on March 11, 2003, but that order is unrelated to the issues that Rongstad would like this court to review.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

APPENDIX J

[LOGO]

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DISTRICT IV

April 1, 2003

To:

Hon. Michael N. Nowakowski
City-County Bldg.
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Madison, WI 53703-3343

Michael P. Crooks
Peterson, Johnson & Murray, S.C.
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Circuit Court Clerk
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Michael R. Bauer
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P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

03-0743-W State of Wisconsin ex rel. *Todd Rongstad v. Circuit Court for Dane County and the Honorable Michael Nowakowski*, presiding (L.C. # 03-CV-177)

Before Dykman, J.

Todd Rongstad petitions for supervisory writ, seeking an order from this court compelling the circuit court to vacate its oral orders of February 28, 2003 and March 11, 2003. A petition for supervisory writ is available only when the duty of the circuit court is plain and its refusal to act within the line of such duty is clear. *State ex rel. Dressler v. Circuit Court,* 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991). Rongstad has not shown that the circuit court has a duty to vacate its orders.

Therefore,

IT IS ORDERED that the petition for supervisory writ is denied *ex parte.*

Cornelia G. Clark
Clerk of Court of Appeals

APPENDIX K

STATE OF WISCONSIN
CIRCUIT COURT, DANE COUNTY
Branch 13

Case No. 03-CV-177
CONTEMPT HEARING

JULIE M. LASSA,

Plaintiff,

-vs-

TODD RONGSTAD, THE VALKYRIE GROUP, LLC, and DOES 1-5, in their individual capacities,

Defendants.

TRANSCRIPT OF PROCEEDINGS held in the above-entitled matter before the HONORABLE MICHAEL N. NOWAKOWSKI, Circuit Judge, at the Dane County Courthouse, in the City of Madison, Wisconsin, on the 28th day of February, 2003, commencing at 3:00 o'clock p.m.

PRESIDING:

HONORABLE MICHAEL N. NOWAKOWSKI
Circuit Judge

APPEARANCES:

The Plaintiff appeared in person, and by counsel EDWARD R. GARVEY and CHRISTA O. WESTERBERG, Garvey & Stoddard, S.C., Attorneys at Law, 634 West Main Street, Suite 101, Madison, Wisconsin;

MICHAEL P. CROOKS and ANTHONY D. CONLIN, Peterson, Johnson & Murray, S.C., Attorneys at Law, 131 West Wilson Street, Suite 200, Madison, Wisconsin, appeared on behalf of the defendants.

ALSO PRESENT:

ATTORNEY DAVID J. PLINER,
Corneille Law Group, LLC

* * * *

[27] MR. GARVEY: Okay. Thank you.

THE COURT: But we'll see you all back on the 11th at 1:15, and you can use that in the notice of motion that you serve on Mr. Rongstad on Monday.

MR. GARVEY: Thank you, your Honor.

MR. PLINER: Your Honor, if I can have just a minute or two?

THE COURT: Mr. Pliner wrote me a letter that I got today—I'm not sure if everyone else has received it—about his client's interest in this. And he and his client American Family, I think—

MR. PLINER: Yes.

THE COURT: Is that right—filed a motion accompanied by a brief. And, as a result, in order to give other people the same opportunity to respond with a brief, I set a briefing schedule, which is what I would ordinarily do. Mr. Pliner's letter today said we don't really need a briefing schedule and please have the hearing earlier. He also I think suggested in the letter that if people had an objection to his request for bifurcation and for stay, that they should let people know and let the Court know within five days.

So I guess we don't have to wait five days. We can find out if there's an objection. Mr. Crooks, [28] what's your client's position on this, since I take it your client is the insured?

MR. CROOKS: Yeah. I don't think he objects to a bifurcation and a stay, your Honor

THE COURT: Mr. Garvey?

MR. GARVEY: Perhaps I—frankly I've not handled—are they talking about a stay of the entire proceedings?

THE COURT: Oh, yes, other than the—whatever proceedings would be had in connection with the coverage dispute.

MR. GARVEY: Well, we would certainly object to any stays of the proceedings, but I'll give you a more formal answer within that five-day period.

MR. PLINER: Judge, I guess part of the motion was just intervention as well because American Family isn't part of the suit yet and that would be separate from the stay. I don't know if there's any objection to that.

MR. GARVEY: May I have just a minute?

THE COURT: Okay.

MR. CROOKS: Judge, we don't object to the intervention.

THE COURT: Let's see if we can get at least a half of a loaf here.

[29] MR. GARVEY: I had to consult a lawyer. Would this stay discovery?

THE COURT: Ordinarily.

MR. PLINER: What we had contemplated would be an intervention and then a stay of all proceedings on the merits pending resolution of the coverage, which I think would be resolved by a summary judgment motion.

MR. GARVEY: Well, no. We would certainly object to that.

THE COURT: All right. Well, let's simply proceed on the schedule that we presently had, and we'll deal with it at the time of the hearing that's now set for, whatever. I don't remember what the date any more is of that.

MR. PLINER: Can I ask for a clarification if there's an objection to our intervention in the case without a stay?

MR. GARVEY: We don't have any objection to your coming in.

THE COURT: I think Mr. Crooks earlier said he didn't.

MR. CROOKS: True.

THE COURT: That part of the motion will be granted, and you'll be permitted to intervene, and

* * * *

FILED
APR 2 4 2007
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SUPREME COURT, U.S.

(3)

No. 06-1084

In the Supreme Court of the United States

TODD RONGSTAD, AND THE VALKYRIE GROUP, LLC
Petitioners

v.

JULIE M. LASSA,
Respondent

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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445 U.S. 573 (1980) 3

Raley v. *Ohio*,
360 U.S. 423 (1959) 3

Respondent neither denies the importance of the questions presented nor offers any serious response to our demonstration that the decision below poses a grave threat to anonymous political speech critical of elected public officials. As confirmed by the *amici*, that decision makes it far too easy for public officials to intimidate and silence issue advocacy groups and their donors. Moreover, as *amici* attest, although cases like Rongstad's recur frequently, aggrieved defendants rarely have the resources and fortitude to absorb contempt sanctions and pursue appeals all the way to this Court. Thus, this case gives the Court an unusual opportunity to resolve longstanding conflicts on issues of vital concern.

Unable to deny these conflicts or otherwise to discount the importance of the questions presented, respondent principally argues that this case is not an appropriate vehicle with which to resolve them. Among other things, she asserts that Rongstad "failed to press [below] the interpretation of *NAACP* and its progeny that he now urges." Opp. 20-21. As we explain below, this is incorrect. But respondent does not deny that the Wisconsin Supreme Court *actually decided* each of the questions presented, in one instance acknowledging and joining the split among the lower courts. Pet. App. 29a. That alone makes the first two questions suitable for review. And respondent does not even dispute that the third question presented (about waiver of First Amendment rights) is properly preserved and merits this Court's attention.

In sum, there is no obstacle to this Court's review of the questions presented, two of which are the subject of pervasive conflicts in the lower courts, and all of which are vital to the preservation of "uninhibited, robust, and wide-open" debate concerning "public issues" and "public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270. (1964).[1]

---

[1] Throughout her opposition, respondent misstates or mischaracterizes the record on points that have nothing to do with the suitability of this case for review. For example, respondent asserts that Rongstad's deposition testimony contradicted the statement in his

I. The Wisconsin Supreme Court's "Preliminary Showing" Requirement Warrants Review.

Respondent does not and cannot deny the deep conflict among the federal circuits and state supreme courts on the first question presented—namely, whether a party resisting the compelled identification of association members who wish to remain anonymous must demonstrate specific harm to First Amendment interests *before* the party seeking such identification must assume the burden of demonstrating a compelling governmental interest. See also CCP *Amicus* Br. 5-9. Indeed, respondent cannot deny that the Wisconsin Supreme Court itself expressly acknowledged that its decision conflicted with the decisions of other courts on this issue. Pet. App. 29a. Nor does she seriously attempt to defend the Wisconsin Supreme Court's ruling on the merits.

1. Respondent argues principally that the Court should not review this issue because, she claims, Rongstad failed to properly raise the issue below. Opp. 20-21. In fact, Rongstad raised the issue repeatedly.[2] But in any event, this Court has

---

affidavit that Rongstad had conversations with Alliance members about the lawsuit. Opp. 7. However, the very deposition testimony that respondent cites for this proposition indicates otherwise. *See* Resp't App. 29a: ("I've certainly had discussions with members about it.") Respondent also inaccurately characterizes Rongstad's attempts to pursue interlocutory appeal of the trial court's discovery and sanctions orders. Opp. 8-9. But these issues have nothing to do with the reviewability of the questions presented.

[2] For example, Rongstad argued in the Wisconsin Supreme Court that "the First Amendment protects against compelled disclosure of a political organization's membership absent a compelling justification." App. Br. 13. He further argued that "state action that '*may have the effect* of curtailing the freedom to associate is subject to the closest scrutiny'" and that "[t]he First Amendment demands heightened judicial scrutiny of a libel claim brought by a public official against critics of his official conduct." App. Br. 14, 33 (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460-461 (1958) (emphasis added); *Sullivan*, 376 U.S at 264). See also Reconsideration Br. 11 ("state

repeatedly ruled that, where a state supreme court considers and disposes of a federal question, this Court may review the issue regardless of whether it has been "preserved" by the losing party. In *Orr* v. *Orr*, for example, this Court described as "elementary [the] rule that it is *irrelevant* to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." 440 U.S. 268, 274-275 (1979) (emphasis added); accord *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959) ("[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it").

Respondent does not dispute (nor could she) that the court below actually decided the first question presented, concluding that Rongstad was required to make a "particularized" "preliminary factual showing" of harm to the Alliance members' First Amendment rights before respondent was required to demonstrate an overriding governmental interest in disclosure. The dissent confirmed that the court addressed and decided this issue. Pet. App. 58a. Accordingly, there would be no obstacle to this Court's review even if Rongstad had *not* raised the issue before the Wisconsin courts. See also *Payton* v. *New York*, 445 U.S. 573, 583 n.19 (1980); *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 n.3 (1971).

---

action which *may have the effect* of curtailing the freedom to associate by disclosing the identities of members of a political group "is subject to the closest scrutiny" and will be upheld only if the State's interest in the disclosure is 'compelling'" (citing *NAACP*, 357 U.S. at 460-63) (emphasis added)); *ibid.* at 12-16 (arguing that court applied erroneous constitutional standard by requiring Rongstad to make a preliminary factual showing of harm to first amendment rights before it would consider whether respondent could show an overriding governmental interest in the disclosure). In short, contrary to respondent's suggestion, Rongstad did not "agree[] . . . with the constitutional test applied by the Wisconsin Supreme Court." Opp. 20.

2. Respondent next suggests that the expressive activity of the Alliance was not entitled to First Amendment protection because it is a "sham association." Opp. 23. But even if that were so, the Wisconsin Supreme Court did not consider any such challenge, and in fact the court's constitutional analysis was predicated on the assumption that the Alliance *was* an "association" entitled to First Amendment protections. As the court explained: "The Alliance for Working Wisconsin is a 501(c)(4) organization whose main purpose is 'to educate the public about public policy issues related to business, taxes and families in Wisconsin and a national, state and local level.'" Pet. App. 4a-5a (quoting the Alliance's articles of incorporation).

Thus, the Alliance is a paradigmatic example of a constitutionally protected expressive association. It is therefore readily distinguishable from the *ad hoc*, non-expressive collection of individuals to whom this Court denied First Amendment protection in the case cited by respondent (at 23). See *City of Dallas* v. *Stanglin*, 490 U.S. 19, 24-25 (1989) (dance hall patrons not a protected "association" where patrons did not "take positions on public questions" or perform other expressive activities).

In any event, respondent's focus on the Alliance's "membership" is misplaced. Opp. 3-4. The record reveals that the Alliance's donors would not be willing to participate in the Alliance unless their identities were kept confidential. Pet. 5-6. Whether or not these contributors are *labeled* "members" is irrelevant to the substantive question whether their associational rights were infringed by the decision below.

3. In an effort to make her discovery requests appear less intrusive, respondent also suggests that she sought to discover the identities of only those individuals who were "involved in the production and distribution of the mailer." Opp. 3. In fact, respondent sought, and the trial court ordered Rongstad to produce, the names of *all contributors* to the Alliance who gave $100 or more during 2002—even

though Rongstad had taken full responsibility for the allegedly defamatory mailer and stood ready to defend the lawsuit and pay any adverse judgment. Opp. 8, 4. The act of contributing funds to an expressive association is itself an expressive activity entitled to First Amendment protection. Respondent had no justification to infringe upon the associational anonymity of the Alliance's contributors, particularly given Rongstad's repeated deposition testimony that he alone produced and distributed the mailer. Pet. 5.

4. Respondent also contends that "the record is devoid of any evidence" showing that the disclosure she sought would chill the Alliance members from exercising their First Amendment rights. Opp. 23-24. Of course, this argument assumes that a chilling of First Amendment rights should not be *presumed* in cases such as this. But that is the very issue that has deeply divided the lower courts. See Pet. 13-17; CCP Br. 5-9. Thus, even if respondent were correct on the facts, her argument would not be a reason to deny review.

In any event, respondent does not deny that she sought the identities of contributors to the Alliance in order to name them as defendants in her defamation lawsuit. Nor does she attempt to explain why such an inherently coercive discovery request would not have a powerful chilling effect on the Alliance's contributors. As numerous courts have held, the chilling effect of such discovery is self-evident. See Pet. 23-24.

5. Finally, respondent half-heartedly suggests that, because no *additional* discovery will be propounded on any Alliance members, the decision below has "no impact on the associational rights of a single [Alliance member]," and the only issue for appeal is the "reasonableness" of the discovery sanctions. Opp. 25. This is patently false. The trial court's order compelled Rongstad to reveal the identities of all those who contributed $100 or more to the Alliance in 2002 and then sanctioned him for failing to produce that information. Accordingly, by upholding *any* sanction for such nondisclosure, the court below infringed Rongstad's First

Amendment rights, regardless of whether any further discovery occurs. And the constitutionality of that sanction is in no way "intertwined with state law on discovery sanctions." Opp. 24-25. In any event, the parties expressly reserved the right to appeal this constitutional issue in their settlement agreement, agreeing on an amount that would be paid by Rongstad in satisfaction of that sanction if its constitutionality was ultimately upheld. Wisc. R. 141 at 2.

Further, as the *amici* note, the issue of which party bears the burden of making a "preliminary showing" in these cases is unlikely to appear before this Court again any time soon. CCP Br. at 12-13. Although this issue continues to arise frequently at the trial level, it is rarely appealed because of the practical realities and structural incentives of litigation. *Ibid.* An aggrieved defendant will rarely have the resources and fortitude to absorb contempt sanctions and pursue an appeal all the way to this Court with a live controversy. *Ibid.*

In sum, none of respondent's purported grounds for suggesting that it would be "improvident" for this Court to grant review has any merit. Opp. 1. To the contrary, as we showed in the petition (and the *amici* confirm), there are several pressing reasons why this Court should decide these important constitutional issues *now*. The questions presented are of particular importance and urgency given the explosion of anonymous political and commercial speech on the internet and the corresponding proliferation of "John Doe" defamation lawsuits brought by public officials and corporations against online speakers. Moreover, as *amici* explain, this Court's recent restrictions on broadcast speech relating to candidates and elections increase the importance of anonymous political pamphleteering as an "alternative avenue" of political communication that (for now) remains relatively free of government regulation. CCP Br. 9-10 (citing *McConnell* v. *FEC*, 540 U.S. 93 (2003)). Thus, the harm caused by the Wisconsin Supreme Court's decision and others like it is amplified in the current regulatory climate. This Court should seize this opportunity for resolving the conflict, rather than

waiting for some future petition that may be a long time coming.

II. This Court's Intervention Is Needed To Clarify That A Public Official Must Show A Viable Defamation Claim Before Obtaining Identities of Anonymous Speakers.

Respondent likewise offers no plausible reason to deny review of the second question presented. There we challenge the Wisconsin Supreme Court's ruling, in conflict with the Delaware Supreme Court and several other courts, that a public official is not constitutionally required to establish that her defamation claim is viable before the court can compel the identification of anonymous speakers. See Pet. 22-25. As shown in the petition and confirmed by the *amici*, the decision below allows public officials to use defamation lawsuits to intimidate critics, regardless of the merits of the officials' defamation claims. Pet. 1, 18-20; CCP Br. 2, 9-10; CFIF Br. 6-12, 15-17.

1. Respondent maintains that the Wisconsin Supreme Court's holding is "consistent with" the Delaware Supreme Court's holding in *Doe* v. *Cahill*, 884 A.2d 451 (Del. 2005). We anticipated and refuted this argument in the petition (at 25-27), but respondent simply ignores our arguments. As shown in the petition, although the Wisconsin Supreme Court stated that courts should "ordinarily" decide a pending motion to dismiss before imposing sanctions against a party asserting a constitutional privilege against discovery, it did not establish a constitutional *requirement* that must be applied whenever there is an assertion of a First Amendment privilege against the compelled disclosure of anonymous speakers. *Ibid.*

Rongstad's case proves this point: the court affirmed the sanctions against Rongstad while acknowledging that Rongstad had asserted a First Amendment privilege throughout the proceedings. Thus, the court's disposition of Rongstad's case indicates that its so-called "prospective rule" is discre-

tionary (as it expressly acknowledged (Pet. App. 21a)), not mandatory as the First Amendment requires.[3]

2. Respondent further argues that Rongstad failed to preserve the second question presented because he "made no constitutional objection based on timing of the motion to dismiss" before the trial court ordered the disclosure at issue. Opp. 12-17. Here, however, the court below passed on the second question, and this Court's review would be appropriate even if Rongstad had not pressed the issue. Pet. App. 15a-31a.

In any event, as explained in the petition (at 27-30), the Wisconsin Supreme Court's refusal to apply its "ordinary" rule in this case based upon a supposed waiver itself raises a First Amendment issue of sufficient import to warrant this Court's review. Respondent acknowledges (Opp. 4-5 & n.4) that Rongstad asserted a First Amendment privilege in response to respondent's discovery requests at the earliest stages of the litigation, that he promptly requested an opportunity to brief the First Amendment issues (which the trial court denied), and that he drew the trial court's attention to the decisions of this Court on the governing constitutional standards—the same decisions cited in the petition. More-

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[3] Moreover, under the court's discretionary rule, a plaintiff's obligation to show that her defamation claim is viable would be triggered only by a "pending" motion to dismiss, not by an objection to a discovery request or subpoena at the outset of the litigation (as occurred in *Cahill* and in this case). For this additional reason, the court's discretionary rule conflicts with *Cahill*.

Respondent incorrectly asserts that our argument that the Wisconsin Supreme Court's decision conflicts with *Cahill* "indicates a lack of understanding of the pleading requirements for defamation under the Wisconsin statutes." Opp. 18. But our argument on this point has nothing to do with state law pleading standards. See Pet. 26 n.13. Thus, respondent's lengthy dissertation on state pleading standards is irrelevant.

over, one week after he was served with the complaint, Rongstad requested "an adjournment of any depositions until after the court has had an opportunity to hear [his motion to dismiss]." Pet. App. 111a. A finding of waiver in these circumstances flouts this Court's presumption against the waiver of First Amendment rights. See *Fuentes* v. *Shevin*, 407 U.S. 67, 95 (1972); *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967). Tellingly, respondent simply ignores this argument, which is the subject of the third question presented.[4]

3. Finally, respondent says that applying the Wisconsin Supreme Court's discretionary "prospective rule" to Rongstad's case "would not have changed" the result because the trial court ultimately denied Rongstad's motion to dismiss. Opp. 19, 16. This argument is baseless. The trial court did not rule on Rongstad's motion to dismiss until some four months after it sanctioned Rongstad. As noted in the petition, had Rongstad known early in the case that respondent's claims could survive a motion to dismiss, he would not have resisted the court's discovery orders and put himself in a position to be sanctioned. Respondent simply ignores this fact.

Moreover, contrary to respondent's assertion (Opp. 19), the court below did not decline to apply its so-called "prospective rule" to Rongstad's case because it "would not have changed" the result. Rather, the court held that Rongstad waived the issue by failing specifically to argue that the trial

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[4] Respondent also suggests that Rongstad failed to preserve this issue because he did not file a motion to dismiss before the court ordered sanctions and did not ask the court to stay discovery after he filed the motion. Opp. 13-15. Here again, to find a waiver on that basis is to violate this Court's strong presumption against waivers of First Amendment rights. In any event, it is unfair for respondent to fault Rongstad for, as she puts it, "delaying to file a motion to dismiss until February 11, 2003." Opp. 14. Rongstad's counsel filed his motion thirteen days after the court denied his request to stay discovery, even though he was required to defend Rongstad's deposition and argue the privilege issues on several occasions during hearings held within that period.

court was constitutionally required to decide his motion to dismiss before discovery proceeded. That holding was contrary to this Court's decisions and is the subject of the third question presented, which respondent simply ignores. Thus, the claim that the so-called "prospective rule" would not have made a difference in this case played no part in the Wisconsin court's analysis and should not be considered here.[5]

*****

Few principles are better established in our constitutional order than that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on . . . public officials." *Sullivan*, 376 U.S. at 270. The decision below represents a frontal attack on this principle. Moreover, it presents issues on which the lower courts are in conflict and which recur frequently but with little chance of Supreme Court review. The Court should take this opportunity to clarify that civil discovery may not be used to unmask a public official's anonymous critics without a prior showing that the official's defamation claim is viable or that there is a compelling governmental interest in such discovery.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Nor did the court below base its decision on the claim that the trial court's sanctions were not "final" until after the trial court ruled on Rongstad's motion to dismiss, as respondent suggests. See Opp. 16, 19-20. Rather, the court acknowledged that the trial court had "already compelled discovery and ordered sanctions" long before it ruled on Rongstad's motion to dismiss. Pet. App. 22a. Indeed, *four months* before ruling on that motion, the trial court held Rongstad in contempt and sanctioned him $1000 per day until he complied with its discovery orders. By themselves, these actions infringed the First Amendment rights of Rongstad and the contributors to the Alliance.

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April 2007

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(3)

Nos. 06-1084

IN THE

Supreme Court of the United States

TODD RONGSTAD and THE VALKYRIE GROUP, LLC,

Petitioners,

v.

JULIE M. LASSA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS AND THE REASON FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a nonprofit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on and deterrent to political communications that will hinder political competition and information-flow and because, in the context of existing restrictions on various forms of election-related communications, it burdens one of the few remaining avenues of free political communication that provides a safety valve relative to the more severe restrictions on other communications.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases rais-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

ing significant constitutional issues. This case involves a serious threat to freedom of speech and association, and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

STATEMENT

As the opinion below recognized, the trial court construed this Court's cases to require petitioners to make "a preliminary factual showing of a reasonable probability that compelled disclosure of members' identities would subject them to threats, harassment, or reprisals from either government officials or private individuals." Pet. App. 6a. The opinion below likewise ruled that the initial burden of proof was on the party asserting the First Amendment privilege to "make a preliminary factual showing that at least demonstrates a reasonable probability of an actual chilling effect on First Amendment rights." Pet. App. 24a. Because there was no showing "of particular instances of past or present threats, harassment, or reprisals," and no "pattern of threats or specific manifestations of public hostility against the Alliance [for Working Wisconsin] or similar groups," the opinion below found that Rongstad "failed to make the required preliminary factual showing, [thus] we need not reach the question of whether there are compelling interests here that would outweigh a constitutional privilege." Pet. App. 27a, 29a.

Particularly with respect to the trial court's order to "disclose the identity of anyone who had contributed $100 or more to the Alliance in 2002," Pet. App. 9a, and in light of the fact that petitioner had testified that he was the only person involved in the preparation or distribution of the allegedly defamatory mailer, Pet. 5, that order imposed a wholly improper burden on the First Amendment right of free and anonymous association.

In a rare show of fortitude, Rongstad continued to refuse to identify persons who had contributed to the Alliance but who had nothing to do with the mailer's preparation or distri-

bution, and suffered monetary and other sanctions for having stood on principle. This case is the rare live controversy that continues to present the issue of the burden of proof for resisting disclosure of anonymous association given that the sanctions remain in effect and subject to appeal even though the underlying defamation case has been settled.

SUMMARY OF ARGUMENT

1. The split identified in the petition is well-established, deep, encompasses state and federal courts, divides courts within the Ninth Circuit, and is geographically far-reaching. It thus presents the type of significant conflict that amply warrants this Court's attention.

2. The steep hurdle to the assertion of First Amendment rights erected by the burden of proof applied below and in numerous other courts operates in areas of core political speech and association and, for that reason alone, presents an important national issue that should be resolved by this Court. But the issue also significantly impacts the larger field of campaign finance and the regulation of political speech relating to elections. When the burden on associational anonymity for grass-roots speech such as the political mailer here is viewed in the context of the existing and extensive restrictions on other forms of election-related political speech, that burden poses a broader and synergistic threat to free speech.

Allowing a breach of associational anonymity by the mere filing of a lawsuit and some discovery requests, without even the pretense of a compelling interest in such disclosure, undoubtedly will deter people and organizations from challenging those in, or seeking to gain, positions of power and thus constrict precisely one of the alternative avenues of communication – political pamphleteering and similar non-broadcast speech – that this Court has viewed as a safety valve for free speech when it allowed limitations on more expensive forms of political speech. Allowing that safety valve to become clogged by additional and improper burdens on asserting First

Amendment rights thus threatens a seeming assumption of this Court's campaign finance jurisprudence and compounds the already significant First Amendment burdens on political speech from campaign finance regulation. The issues presented here thus have significance well beyond their immediate application in the defamation context.

3. This Court should take the opportunity now to address the burden of proof for asserting a privilege of associational anonymity because such issues, though arising often at the trial level, rarely make it up to this Court and future opportunities to resolve the split may be few and far between. The burden-of-proof issue presented here typically arises at a preliminary stage of litigation, generally would require an uncertain interlocutory appeal or petition for mandamus to receive timely appellate review, and once resolved at the trial stage will often never see the light of day again given the practical consequences and structural incentives of litigation that make it difficult and often pointless to appeal through multiple courts on the burden of proof itself. It is thus a rare case, such as this one, where a litigant stands on principle, absorbs contempt and other sanctions, and nonetheless continues to fight all the way to this Court with a live controversy. Because the issue will continue to affect First Amendment rights at the trial level even absent effective avenues for appeal, this Court should avail itself of the current petition as a vehicle for resolving the split, rather than wait for some future petition that may be a long time coming.

ARGUMENT

I. The Petition Presents a Question that Has Divided the Federal Circuits and Highest State Courts.

As the petition correctly notes, at 13-17, and as the opinion below partly recognized, Pet. App. 29a n. 21, there is a substantial split among the federal circuits and state high courts over whether a party asserting a First Amendment privilege to withhold the names of anonymous associates or contributors bears the initial burden of proof of particularized harm from disclosure or whether instead the party seeking disclosure bears the initial burden of establishing a compelling interest that will be served by a narrowly tailored disclosure. This issue arises not only in the defamation context, but in the grand jury and administrative investigation contexts as well.

The split presented by this case is deep and well established. On the one side are three courts that correctly require the party seeking disclosure initially to demonstrate a compelling interest that will be served by a narrowly tailored disclosure. *See AFL-CIO* v. *FEC*, 333 F.3d 168, 176 (CADC 2003) (upholding First Amendment challenge to regulation requiring disclosure of documents naming labor union and political party officials, employees, and volunteers by putting the initial burden on government to demonstrate its interest in disclosure despite the absence of compelling evidence relating to reprisals and harassment because such evidence is required "only after concluding that the disclosure requirements at issue survived strict scrutiny as the least intrusive means of achieving * * * compelling government interests"); *NLRB* v. *Midland Daily News*, 151 F.3d 472, 475 (CA6 1998) (affirming denial of enforcement of a subpoena for identities of newspaper's anonymous advertisers because government failed to demonstrate a "substantial state interest" and court held, without requiring particularized proof, that denial of

anonymity would chill anonymous advertising); *Britt* v. *Superior Court*, 20 Cal.3d 844, 854, 864-65 (Cal. 1978) (vacating a discovery order aimed at political associations of plaintiffs and holding that "private association affiliations and activities such as those at issue here 'are presumptively immune from inquisition' * * * and thus the government bears the burden of demonstrating the justification for compelling disclosure"; offering extensive discussion of this Court's cases) (citation omitted).

An additional three courts have similarly placed the burden on the party seeking disclosure to demonstrate a compelling interest furthered by a narrowly tailored disclosure, but then held that the party seeking disclosure had satisfied its burden. *See In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-04 (CA2 1985) (applying "well established" standards to require government initially to show compelling interest with a substantial relation to information sought before requiring proof of "particularized harm" in order to curtail an "otherwise justifiable investigation" into associational relationships; ultimately rejecting asserted privilege and affirming order of civil contempt where government satisfied burden); *Master Printers of America* v. *Donovan*, 751 F.2d 700, 705 (CA4 1984) (holding that failure to establish a "substantial burden" on association from disclosure "is not the end of the inquiry" and that because a "serious claim of infringement has been made" the government must show a compelling interest and narrow tailoring; finding that the government satisfied its burden and enforcing the challenged disclosure requirement), *cert. denied*, 474 U.S. 818 (1985); *In re Grand Jury Subpoenas for Locals 17, 135, & 608*, 528 N.E.2d 1195, 1198-1200 (N.Y.) (upholding enforcement of subpoenas for union membership lists only after finding that information sought is "substantially related to a compelling governmental interest" even absent particularized showing of harm and only a bare assertion of an "inevitable 'chilling effect' on the association rights" of union members that the court found to be

weaker than the effect presumed in other political association cases), *cert. denied*, 488 U.S. 966 (1988).

On the other side of the split are four courts, including the one below, that erroneously require the party asserting the First Amendment privilege initially to establish a probability of harm to the association or its members from the disclosure being sought. *See* Pet. App. 29a (requiring particularized factual showing of harm, finding that petitioner failed to make such showing, and concluding that "we need not reach the question of whether there are compelling interests here that would outweigh a constitutional privilege."); *Dole* v. *Local 375, Plumbers Int'l Union of America*, 921 F.2d 969, 971-72 (CA9 1990) (affirming enforcement of a subpoena for records disclosing contributors to a union fund by placing the initial burden of demonstrating harm on the party asserting privilege, holding that proffered evidence of harm was insufficient to meet that burden, and hence declining to even consider the nature of the government's asserted interest), *cert. denied*, 502 U.S. 868 (1991); *Salvation Army* v. *Department of Community Affairs of the State of New Jersey*, 919 F.2d 183, 201 (CA3 1990) (remanding to allow a First Amendment associational claim to go forward but holding that party asserting First Amendment privilege against disclosing beneficiaries of its services must "present evidence to the district court demonstrating that [such disclosure] * * * will dissuade individuals from participating in its rehabilitation program," and only if such "a prima facie showing" of harm is made will the government then have to demonstrate that its "reporting requirement is narrowly tailored to a compelling interest"); *United States* v. *Comley*, 890 F.2d 539, 543-44 (CA1 1989) (affirming enforcement of subpoena for tape recordings of conversations, holding that party asserting First Amendment privilege must "make a prima facie showing of" a chilling effect from the disclosure before the burden shifts to the government, finding that the party failed to make such a showing, but find-

ing in the alternative that the subpoena was narrowly tailored to serve a compelling interest in any event).

An additional two courts have imposed the initial burden of proof on the party asserting the First Amendment privilege, found or assumed the burden to have been satisfied, and then either resolved the dispute or remanded for further proceedings. *See United States* v. *Citizens State Bank*, 612 F.2d 1091, 1094-95 (CA8 1980) (suggesting that prima facie showing by party asserting privilege had been satisfied but nonetheless vacating and remanding "for a determination of whether compelled disclosure of all the records sought would adversely affect appellants' freedom of association" and requiring a demonstration of a compelling need only "if appellants' First Amendment rights would be infringed by forcing the bank to divulge certain documents"); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376-77 (Tex. 1998) (requiring party asserting privilege to "bear[] the initial burden to make a *prima facie* showing that the trial court's orders will burden First Amendment rights" by showing a "'reasonable probability that the compelled disclosure will subject them to threats, harassment, or reprisals,'" but then granting mandamus to block discovery of contributor list because burden was met) (citation omitted).[2]

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[2] The Tenth Circuit has been somewhat ambiguous regarding its view of the burden of proof. In *In re Grand Jury Subpoena to First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 117, 118-19 (CA10 1983) it simultaneously suggests a presumed deterrent effect and a "readily apparent" chilling effect from compelled disclosure of membership lists sufficient to require the government to demonstrate a compelling interest and narrow tailoring, yet also remands with instructions to determine whether a subpoena "would likely chill associational rights" before requiring the government to show a compelling need for the membership documents.

The Supreme Court of Washington is likewise somewhat ambiguous regarding the nature of the threshold burden. In *Snedigar* v. *Hodderson*, 786 P.2d 781, 785-86 (Wash. 1990) (*en banc*), the court required the party seeking disclosure to demonstrate a compelling interest even in the face of "a speculative claim of harm" by the party asserting the First Amendment

All told, on the preliminary issue of the burden of proof in associational disclosure cases, six courts (CADC, CA2, CA4, CA6, Cal., and N.Y.) place the burden on the party seeking disclosure of member or contributor information from private associations, six courts (CA1, CA3, CA8, CA9, Tex., and Wisc.) place the burden on the party asserting a First Amendment privilege to the privacy of such associations, and two courts (CA10 and Wash.) are somewhat ambiguous as to where they place the burden. The split cuts across the state and federal appellate courts, divides state and federal courts within the Ninth Circuit, and extends across geographic jurisdictions from coast to coast. It thus presents an important conflict among the federal circuits and state highest courts that threatens the uniformity of federal constitutional law and warrants this Court's attention.

II. The Petition Presents an Important National Issue that Should Be Resolved by this Court.

As the petition correctly notes, and this Court has frequently held, anonymity and associational privacy are important aspects of the freedom of speech and important conditions for allowing such freedom to exist. Pet. 17. Forced disclosure of anonymous contributors or associates by definition imposes *some* burden on First Amendment rights, and to require parties initially to *prove* the concrete adverse effects of disclosure – before disclosure has even occurred – simply shifts power to the government and public figures seeking to expose and punish their critics. The effects of that shift will be to discourage public criticism of those already in a position of power and deter political involvement and association by those who lack such power. As the opinion below recog-

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privilege. Although the court rejected any need for proof that disclosure would "in fact impinge" on First Amendment rights, it articulated a test that the party asserting privilege "need demonstrate only some probability that its First Amendment rights will be harmed by disclosure in order to make a successful showing of associational privilege." *Id.* at 786.

nized, "[t]here is no shortage of cases involving claims of defamation by candidates for public office against those who have criticized them," Pet. App. 17a n. 14 (citing cases), notwithstanding the fact that such cases are rarely, if ever, successful, Pet. App. 60a n. 40 (Prosser, J., dissenting). That effect on political speech and association is reason enough to view this case as important.

A further reason why this case is of particular national importance, however, has to do with the synergies between the burdens on speech in this case and the increasing restrictions permitted by this Court's campaign finance jurisprudence. As this Court well knows, broadcast speech related to candidates and elections is highly regulated. *See McConnell* v. *FEC*, 540 U.S. 93 (2003) (upholding numerous restrictions on electioneering communications and other election-related activities). In upholding such regulation, this Court has seemed to minimize the resulting burden on speech by noting the existence of alternative avenues of communication that (for now) remain less regulated. *Id.* at 139, 203-04 (relying on alternative avenues and opportunities to engage in the expressive activities being restricted by BCRA to downplay the First Amendment impact).[3]

Indeed, it has become a standard argument of those seeking further to suppress the discussion and criticism of candidates for office that even greater restrictions on political speech and association are permissible so long as there are supposedly adequate alternative avenues of communication

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[3] *Amici* do not agree with the lenient approach this Court has used in its past campaign finance decisions, and have submitted numerous briefs to this Court to that effect. Under *amici's* view, even a wide-open alternative avenue of communication does not justify content-based restrictions on core political speech via broadcast avenues of communications. But assuming, *arguendo*, this Court's adherence to some of its past analysis on the point, the loss of alternative avenues takes on even greater importance given the synergy with existing federal and state restrictions on broadcast and other forms of political communication.

available elsewhere. *See, e.g.*, FEC Appellant's Br. in *FEC* v. *Wisconsin Right to Life, Inc.*, No. 06-969 (Feb 23, 2007), at 35-36; McCain Appellants' Br. in *McCain* v. *Wisconsin Right to Life, Inc.*, No. 06-970 (Feb.23, 2007), at 29-31.

Insofar as this Court's campaign finance jurisprudence indeed depends, even in part, on the supposed adequacy of such alternative avenues of communication, the issue presented in this case becomes an extremely serious national issue in that it threatens to undermine one of the most longstanding and time-honored alternative avenues of political criticism – political pamphleteering. As various forms of political communication become more constrained, the importance of the remaining forms of communication, such as the one in this case, is magnified. Indeed, the relatively inexpensive and accessible form of political communications and association threatened in this case is one of the few remaining means for persons to associate together and spread their political message without fear of the regulatory minefield surrounding other types of broad-reaching political speech. If that avenue of political speech and association becomes constricted by the too-easy loss of associational anonymity, the predicate for this Court's rulings on a variety of campaign finance restrictions is cast into doubt and the burden on speech from those other restrictions is magnified and compounded by the clogging of a free-speech safety valve.

Given the synergies between restrictions on the political speech and association in this case and restrictions on larger and more broad-based political activities regulated by campaign-finance laws, the issue in this case has significance well beyond the discrete context of political defamation cases. It instead has ripple effects on the entirety of the regulatory regime for all political speech related to candidates for election.

III. This Court Should Avail Itself of the Current Opportunity to Address the Questions Presented Given the Uncertain Path To Appellate Review in Other Cases Raising the Same Issues.

This Court should grant this particular petition for the further reason that it is one of the few opportunities this Court likely will have to address the burden of proof for asserting a privilege of associational anonymity. Cases presenting the preliminary, though important, issue of the burden of proof for asserting a that privilege are not likely to reach this Court with any regularity given the practical and structural impediments for appealing the issue this far.

Regardless on which party the initial burden is placed, if the party satisfies that threshold test, there is no occasion to appeal the *burden-of-proof* issue even if the party subsequently loses on the full balancing of interests. If the party bearing the burden fails the threshold test, there is the theoretical opportunity to appeal, but practical difficulties may keep such appeals largely a matter of theory instead of reality. For example, if the party seeking disclosure fails at the threshold and does not obtain such disclosure, the issue is interlocutory and not likely subject to exceptions for immediate appeal, at least in the context of defamation cases. The case thus would proceed (or not, if it were merely a means to harass a critic) and at the conclusion or settlement of the case there would be little incentive and little gain in pursuing an expensive appeal up to this Court.[4]

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[4] The one scenario in which the issue seems more likely to be appealed is when a court denies enforcement of a government subpoena. While those cases indeed present the burden-of-proof issue, and the government has different and stronger incentives to appeal, they do not often present the issue in the especially pointed context of this case – a candidate seeking to unmask contributors to a vocal critic – and hence would not necessarily highlight the seriousness of the First Amendment issues involved.

If it is the party resisting disclosure that fails the threshold test, an interlocutory appeal or petition for mandamus might well be available, but such avenues are uncertain at best, were of no use in this case, increase the expense and burden that may have been the point of the suit in the first place, and thus are not reliable vehicles for reaching this Court. Absent such immediate appeal, if the party complies with the discovery order and discloses its membership or contributors, the "cat is out of the bag" and cannot be stuffed back in. Any appeal at the end of the case thus would be of little direct benefit and would again simply compound the expense and burden of the suit. A party could, of course, refuse to comply with the order and accept contempt and other sanctions, as petitioner did in this case, but, again, such a path is uncertain and requires unusual fortitude and resources to take the risk of such penalties. The rare litigants, like Rongstad, who do take that path, thus offer this Court the few opportunities it may have to review a case where the burden of proof is not only squarely presented, but was in fact dispositive of the dispute over disclosure. This Court should be reluctant to let such an opportunity pass.

In deciding whether to grant the petition, this Court thus should remain mindful of the simple point that the burden-of-proof issue can arise often at the trial level and have significant impact on the parties and the First Amendment, but, as a practical matter, the issue is unlikely to be presented to this Court with any frequency. Given the likely paucity of petitions, the importance of the issues presented, and the deep and longstanding split involved, this Court should grant the current petition rather than wait for some other case that may be a long time coming.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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In The
Supreme Court of the United States

TODD RONGSTAD AND
THE VALKYRIE GROUP, LLC,

Petitioners,

v.

JULIE M. LASSA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF CENTER FOR INDIVIDUAL FREEDOM, EVERGREEN FREEDOM FOUNDATION, GOLDWATER INSTITUTE, INDEPENDENCE INSTITUTE, MACKINAC CENTER FOR PUBLIC POLICY, AND RIO GRANDE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI*

Pursuant to Rule 37.2 of this Court, the following public policy organizations (together, the "Policy Organizations") respectfully submit this *amicus curiae* brief in support of Petitioners.[1]

The Center for Individual Freedom is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association, and religious freedoms.

The Evergreen Freedom Foundation is a non-partisan, public policy research organization based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Its efforts focus on state budget and tax policy, labor policy, welfare reform, education, citizenship, and governance issues.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies.

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[1] The Policy Organizations have received consent from counsel of record pursuant to Sup. Ct. R. 37.2, as submitted with this brief. The Policy Organizations affirm, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Independence Institute is a non-partisan public policy research organization based in Colorado that provides policy makers and the public with educational and analytical material addressing a broad spectrum of policy issues from a free-market perspective.

The Mackinac Center for Public Policy is a nonprofit, nonpartisan research organization based in Michigan that promotes sound solutions to state and local policy questions from a market-based perspective.

The Rio Grande Foundation is a research institute dedicated to increasing liberty and prosperity for all New Mexicans by promoting the importance of individual freedom, limited government, and economic opportunity. The Foundation focuses on constitutional liberties, budget and tax policy, and educational reform.

Each of the Policy Organizations regularly comments on controversial issues and the persons, including elected officials, responsible for promoting and implementing them. Each of the Policy Organizations is supported by donations from individuals, many of whom wish to not be publicly identified with a particular ideology, policy or movement. Each of the Policy Organizations believes that public disclosure of the identities of their contributors would make it significantly more difficult for them to raise funds to support their efforts. Each of the organizations believes that, if their contributors were publicly disclosed and subjected to defamation claims for the statements of the organizations, their ability to raise sufficient funds from individuals across the country would be severely compromised.

The fact that the highest court in a state has held that public officials may file suit and immediately compel

disclosure of the anonymous donors to policy organizations directly impacts the interests and continued viability of the *amici*. As such, the Policy Organizations have a vital interest in this case.

SUMMARY OF ARGUMENT

Review is necessary because the Wisconsin Supreme Court's decision is inconsistent with the principles underlying this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964), because "the rule of law applied by the [Wisconsin] courts is constitutionally deficient for failure to provide the safeguards for freedom of speech . . . that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of [her] official conduct." The approach taken by the Wisconsin Supreme Court will chill speech and association by subjecting policy organizations' donors to defamation suits whether they are responsible for the allegedly defamatory speech or not. This approach is inconsistent with both the strict standards for defamation actions by public officials discussed in *New York Times* and the right of anonymous association recognized in *NAACP v. Alabama*, 357 U.S. 449 (1958), because it permits a public-official plaintiff to impose a particularly damaging judicial remedy on anonymous donors – *i.e.*, stripping them of their anonymity – before the plaintiff has shown actual malice or falsity. In short, it gives some public-official plaintiffs in defamation suits what they want – a mechanism to intimidate and expose donors – without the predicate demonstration that their suit has merit. If this becomes the standard across the nation, it will shut off the

lifeblood of groups like the Policy Organizations and substantially chill political speech. *See* Sup. Ct. R. 10(c).

Review is also warranted because, since *NAACP* in 1958, this Court has recognized that the right of anonymous association necessitates an evidentiary privilege that prevents the disclosure of the names of contributors to or members of political organizations unless the plaintiff can demonstrate a sufficiently important interest in obtaining that information.[2] However, the precise scope of this privilege, the circumstances in which it may be invoked, the burden necessary to demonstrate its applicability, and the party responsible for meeting this burden have never been clearly established by this Court. In the absence of clear national guidelines, federal and state courts have created a patchwork of approaches regarding the scope and operation of the associational privilege. Indeed, the applicable standard can vary within a state based on whether the claim is brought in state or federal court. Definitive guidelines in an area touching upon delicate

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[2] Courts often discuss the First Amendment's guarantee of anonymous or private associational activity within the context of attempts to resist discovery regarding such activity. Thus, it has become commonplace to refer to the right of anonymous association as a privilege against compelled discovery. *See T.S. v. Boy Scouts of Am.*, 138 P.3d 1053, 1059 (Wash. 2006) (associational right creates a qualified evidentiary privilege under the civil rules of discovery). However, it is important to remember that what is at issue in this case is not merely the application of a testimonial privilege. Rather, the associational privilege is simply a manifestation of the fundamental First Amendment right to privately associate to promote a political viewpoint. Thus, throughout this brief, the Policy Organizations will refer to the "associational privilege" when discussing this right within the context of a litigant's ability to resist discovery, but will focus generally on the First Amendment right to be free from compelled disclosure of private political activity.

First Amendment rights are therefore necessary so that the vitality of this important constitutional right does not vary from state to state or circuit to circuit. *See* Sup. Ct. R. 10(b) and (c).

Finally, this Court should grant review to determine what those national standards and specifics are. In that regard, this Court should set standards that are consistent with the strong protections for free speech and association contained in *New York Times* and *NAACP.* Thus, this Court should determine that, in defamation suits in which a public official seeks to obtain private donor lists, a defamation suit is, in and of itself, sufficient evidence of a chilling effect that the burden should be on the plaintiff to produce evidence of why compelled disclosure is necessary. Similarly, this Court should hold that policy organizations can be ordered to disclose their donors – and such donors named as defendants – only in the most extreme circumstances. An example of when such disclosure would be constitutionally permissible would be when the public-official plaintiff is able to demonstrate facts that would be sufficient to pierce the corporate veil if the organization engaging in the alleged defamatory activity were a for-profit corporation. Anything less will result in a serious erosion of First Amendment speech and associational rights in this country and significantly mute the voices of speakers like the Policy Organizations. *See* Sup. Ct. R. 10(c).

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S HOLDINGS IN *NEW YORK TIMES v. SULLIVAN* AND *NAACP v. ALABAMA*

This case directly affects the ability of donors to anonymously contribute to organizations that comment on both public policy and the officials who shape that policy. The Respondent here brought a defamation suit against a policy organization that had criticized her in a mailing. She then sought to compel the production of the names of the organization's contributors in order to name them as defendants in the suit, regardless of whether, or to what extent, such contributors played a role in the preparation of the mailing. The trial court permitted the Respondent to discover these names without having to demonstrate that her suit had merit, that she had a compelling need for the identity of these contributors, or that these contributors had the slightest involvement in the production of the mailer besides writing a check to the organization that produced it. The Wisconsin Supreme Court affirmed. This result is at odds with the principle that citizens should be able to criticize their elected officials without official retaliation and the Wisconsin Supreme Court's opinion has provided elected officials wishing to intimidate and harass their ideological opponents with both the ways and means to do so. Because this holding undermines the principles embodied in this Court's decisions in *New York Times* and *NAACP*, this Court should grant the Petition and reverse the Wisconsin Supreme Court.

A. *New York Times* Created Strict Standards For Defamation Suits By Public Officials

This Court's decision in *New York Times* has become the starting point for discussions of the scope of the protections of the First Amendment. Few sentences from this Court are as famous, and justifiably so, as Justice Brennan's statement that courts look at infringements of free speech "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times,* 376 U.S. at 270. In light of this commitment, this Court concluded that criticism of the conduct of public officials "does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Id.* at 273. For this reason, this Court mandated that, for cases involving claims of libel regarding public officials, a plaintiff must prove that the "statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

It is therefore curious that, given that these bedrock constitutional principles are so universally accepted and applauded, the Wisconsin Supreme Court decided to pay them such little regard. The decision below narrowly applies the principles that underlie the *New York Times* decision and renders that case essentially null by assuming that the purpose of defamation suits by public-official plaintiffs is to go to trial and ultimately prevail by winning the suit and receiving damages. The Wisconsin Supreme Court's decision therefore assumes that the "actual malice" standard is all the protection a speaker needs when he or

she criticizes a governmental official. However, as discussed below, victory and damages are often not the goal of a defamation suit brought by the public-official plaintiff. Thus, having a high level of proof in order to prevail on the merits does little to create a disincentive for harassing and intimidating suits because, under the Wisconsin Supreme Court's rule, a public-official plaintiff may achieve a substantial judicial remedy just by filing suit and undertaking discovery.

B. The Goal Of Defamation Suits By Public Officials Is Often Not To Receive Damages, But To Intimidate And Harass Political And Ideological Opponents

The goal of a public-official plaintiff is not always to recover damages. Often, the purpose of a defamation suit is to intimidate, harass and make it expensive for critics to continue to exercise their free speech rights. A public official may believe that she can insulate herself from criticism by filing suit against her ideological and political opponents, causing them to incur litigation costs. More importantly from the Policy Organizations' standpoint, however, a public official may believe that she can quarantine policy groups and cut off their access to funds by publicly unmasking such groups' supporters and making it expensive and inconvenient for these supporters to continue to contribute to the objects of her wrath. Achieving this goal may often be as satisfying, or more satisfying, than obtaining a judgment and damages against the alleged defamer. This appears to have been the case here, as the plaintiff promptly gave up prosecution of her case once Rongstad had provided the donors' names.

Compelled disclosure is, quite simply, the goal of many defamation suits and the Wisconsin Supreme Court's decision does nothing to dissuade public-official plaintiffs from bringing meritless claims solely to harass and intimidate the donors to policy groups. In fact, the bar set for compelled disclosure by the Wisconsin Supreme Court is so low that the public-official plaintiff may become an increasingly common feature of our political and legal system. As the Delaware Supreme Court put it in the context of anonymous Internet speech:

> A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." . . . After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extrajudicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.
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> . . . .
>
> . . . "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern. . . .

Doe v. Cahill, 884 A.2d 451, 457 (De. 2005) (alteration in original; footnotes omitted; quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 859, 890 (2000)).

Thus, the disincentive this Court created for public officials to use defamation suits to suppress speech by fashioning the difficult "actual malice" standard is fatally undermined by a regime, like the one created in the decision below, in which a plaintiff may obtain relief and discourage criticism without having to demonstrate that they have a viable defamation claim. In short, the Wisconsin Supreme Court, while pretending to follow *New York Times,* has laid out a roadmap for that case to become simply a vestigial organ of constitutional jurisprudence.

C. *NAACP* Holds That Compelled Disclosure Will Result In A Significant Chilling Of Associational Rights

The decision below thus has two pernicious affects. First, it provides public officials with a mechanism by which they can avoid the strictures of the "actual malice" standard, as discussed above. Second, it creates this mechanism at the expense of the associational rights of people who have lent their support to groups that comment on public policy and public officials. In that regard, *New York Times* is not the only case from this Court that the Wisconsin Supreme Court has shunted aside – the court likewise disregarded the principles underlying *NAACP*. Indeed, it could be said that this case stands at the intersection of *New York Times* and *NAACP* and that the court below managed to get both holdings wrong.

In *NAACP,* this Court held that compelled disclosure of private political memberships and activities could significantly affect the exercise of First Amendment free speech rights. *NAACP*, 357 U.S. at 460. As this Court stated:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

Id. at 462. Thus, courts generally recognize that the First Amendment prohibits compelled disclosure of private political activities unless the government or a litigant can demonstrate a sufficiently compelling reason to disclose such information.

The court below gave short shrift to this important right. Quite simply, as the Policy Organizations well know, forced disclosure of the private donations to such organizations would have a tremendous chilling effect on the willingness of donors to continue to fund these organizations. This is particularly true of donors to the Policy Organizations, which frequently take controversial stands at odds with the political and business establishment of their respective states and across the nation.

For instance, public school teachers who contribute to organizations that support school vouchers, such as the Evergreen Freedom Foundation and the Mackinac Center,

might well suffer significant professional repercussions if their contributions are disclosed. Similarly, if a government employee was found to have contributed to an organization that advocates limited taxation and smaller government, such as the Independence Institute or Goldwater Institute, this too could have significant negative effects on the employee's career. Because forced disclosure would have a chilling effect on the willingness of donors to fund the organizations, the organizations themselves will have fewer resources with which to convey their message. At this point, the speech and associational rights of both the donor and the donee have been irrevocably compromised and a result far more serious than an award of damages may be visited on any group that runs afoul of a vengeful legislator equipped with a tenacious lawyer. In this way, the decision below gives public officials the means to achieve the very harms this Court sought to avoid in *New York Times* and *NAACP*. Review by this Court is therefore not only warranted, but imperative for the maintenance of free and open discourse in this country.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE SPECIFICS AND SCOPE OF THE RIGHT TO ANONYMOUS ASSOCIATION

While the existence of the right to anonymous association is largely accepted, in *NAACP* this Court did not go into any significant detail about the precise boundaries of this right or the mechanisms by which a party may invoke its protections. As such, federal and especially state courts have fashioned a variety of approaches regarding, among other things, which party bears the burden of going forward regarding the application of the right. Thus, as noted by the Petitioners, the standards by which a defendant may assert

the right of association will vary based on the state in which the public official brings suit. *See* Pet. at 13-17. The Policy Organizations concur and believe that this fact alone warrants that this Court grant the Petition. In that regard, however, the Petition actually understates the level of uncertainty regarding the proper standard.

For instance, the California Supreme Court has held that a presumption of nondisclosure applies to all politically oriented associations, regardless of whether they are politically popular or unpopular. *See Britt v. Superior Court of San Diego County*, 574 P.2d 766, 772 (Cal. 1978) ("If the constitutional protection of associational privacy were to be completely withheld from selected organizations simply because they were not sufficiently unpopular, the inevitable effect would be to deter many individuals, particularly those who may be most vulnerable to retaliation by those opposed to such organizations' aims, from participating in such constitutionally protected activities."). The California state courts therefore assume that forced disclosure will result in damage to First Amendment rights.

In contrast, the Ninth Circuit requires a litigant to demonstrate that disclosure will result in harassment, membership withdrawal, discouragement of new members, or other consequences that objectively suggest an impact on, or chilling of, associational rights. *See Dole v. Local Union 375*, 921 F.2d 969, 972 (9th Cir. 1990). This showing must be based on objective and articulable facts that go beyond broad allegations or subjective fears. *Id.* The Ninth Circuit therefore requires the defendant to *prove* that compelled disclosure will result in damage to First Amendment rights – the exact thing that the California state courts will assume exists.

This already confusing situation for the hapless California litigant is further exacerbated by the operation of Rule 501 of the Federal Rules of Evidence, which provides that state privilege law applies in civil actions where an element of the claim is based on state law, while cases involving federal questions are governed by principles of federal common law.[3] *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 n. 10 (9th Cir. 1992).

Thus, when a public official sues a policy organization for defamation in California and seeks disclosure of its donors, the issue of whether the plaintiff or the defendant has the burden of going forward first depends on whether the plaintiff brings the claim in state or federal court. If brought in federal court, the question of burden turns on whether the federal court would find that a defamation suit encompasses specific claims under California state law or whether the issue of privilege is a federal question governed by federal common law. At this point, the right to associational privacy becomes a guessing game and speakers lose any sense of certainty regarding the level of protection of their associational rights.

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[3] Rule 501 provides that "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

As this Court recognized in *NAACP,* however, the inviolability of privacy in free association is vital to the full expression of First Amendment rights. A patchwork pattern of approaches regarding this necessary right undermines its vitality and the willingness of citizens to place their faith in it. Uncertainty can, in and of itself, create a chilling effect. *Cf. Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 871-72 (1997) (vague rules create an obvious chilling effect on free speech). This Court should grant the Petition and set uniform standards for the invocation of this constitutional right. *See* Sup. Ct. R. 10(c).

III. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT PUBLIC-OFFICIAL PLAINTIFFS MAY ONLY REACH THE DONORS TO POLICY ORGANIZATIONS IN THE MOST EXTREME CIRCUMSTANCES

Of course, should this Court grant the Petition to clarify the proper constitutional standard, it must then articulate what that standard should be. Consistent with *New York Times* and *NAACP*, the right to anonymous association in defamation cases involving public official plaintiffs seeking to compel disclosure of private political activities should be very strong indeed.

A. In Cases Involving Public Officials, Courts Should Presume A Defamation Suit In And Of Itself Constitutes Specific Harm To First Amendment Rights

The Wisconsin Supreme Court required Rongstad to make a preliminary *prima facie* showing of harm to First Amendment rights based on objective and articulable facts

to invoke the First Amendment associational privilege. *Lassa v. Rongstad*, 718 N.W.2d 673, 689-90 (Wis. 2006). The Wisconsin Supreme Court followed the Ninth Circuit on this point. *See id.* at 690 (citing *Brock v. Local 375*, 860 F.2d 346 (9th Cir. 1988); *Dole,* 921 F.2d at 973). Both courts traced this requirement to this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley,* this Court held that minor parties could avoid compelled disclosure of their contributors pursuant to the Federal Election Campaign Act only by proving a reasonable probability that such disclosure would subject them to threats, harassment, or reprisals from either government officials or private parties. *Id.* at 74.

However, this conclusion ignores the fact that a defamation claim in which a public-official plaintiff seeks to compel disclosure of contributors to a policy organization, regardless of whether they played a role in the allegedly defamatory speech, is the very definition of harassment. The Respondent in this case offered no evidence whatsoever that the contributors to the policy organization had any responsibility for the allegedly defamatory speech at all. Nor did she claim that they possessed any unique information relevant to her claims that she could not obtain elsewhere. She simply wished to add them as defendants to her lawsuit. Individuals who merely write checks to policy organizations with whose views they agree do not expect to be held legally responsible for every statement the organization makes, nor do they anticipate having to hire lawyers and defend themselves in defamation actions simply for exercising their right of association. Allowing plaintiffs in defamation suits to compel the disclosure of contributors to policy organizations without any evidence that they played a role in the

allegedly defamatory speech will necessarily chill speech. For this reason, this Court should grant review and hold that the possibility of being named as a defendant in a defamation suit should be presumed to be a *prima facie* showing of harm to the contributors' First Amendment rights.

B. Plaintiffs Should Have The Ability To Name Contributors To Policy Organizations Only In Exceptional Circumstances And Only Upon A Showing Of Compelling Need

In this case, the trial court ordered the disclosure of the contributors to the Alliance for a Working Wisconsin without the plaintiff having proved that these contributors had any role in the allegedly defamatory mailer outside of writing a check to the Alliance. If merely writing a check to a policy organization is enough to subject a contributor to disclosure and being named as a defendant in a defamation suit, then the Wisconsin Supreme Court's decision will stand as a powerful disincentive for people to contribute to groups like the Policy Organizations.

This Court should grant the Petition and hold that only in the most exceptional circumstances may a public-official plaintiff go beyond the policy organization responsible for the allegedly defamatory material. This Court should also recognize, however, that a plaintiff who has actually been defamed should be able to recover compensation for any harm done to her. To balance the First Amendment rights of contributors and the interests of plaintiffs who are actually defamed, this Court should hold that a plaintiff may go beyond the policy group and reach its contributors only in circumstances similar to those

in which courts permit plaintiffs to "pierce the corporate veil" of for-profit corporations. Thus, a plaintiff may reach contributors to an organization, for instance, when there is an absence of formalities regarding normal non-profit existence, such as a lack of directors or members, a failure to file with the Secretary of State's office, or a failure to keep corporate records, or when there is personal use of the non-profit's funds, or an attempt to perpetuate a fraud using the non-profit's corporate vehicle. *See Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984) (listing factors under which courts will disregard the for-profit corporate entity).

Granting the Petition will allow this Court to carefully construct rules for cases such as this that properly balance the ability of a defamed plaintiff to recover damages with the vitally important free speech and associational rights of groups like the Policy Organizations and the individuals that contribute to them. The standards that exist now are both inconsistent with, and insufficiently protective of, First Amendment rights and review by this Court is therefore necessary.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Policy Organizations respectfully request that this Court grant the petition for a writ of certiorari.

DATED: March 7, 2007

Respectfully submitted,

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